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AND
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IN
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FROM JULY 1, 1905, TO JUNE 30, 1906.

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

OPENING OF THE UINTAH INDIAN RESERVATION LANDS IN THE
STATE OF UTAH.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS, it was provided by the act of Congress, approved May 27, A. D. 1902 (32 Stat., 263), among other things, that on October 1, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: *Provided*, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre; "

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the act of Congress, approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the act of Congress, approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said acts of Congress, do hereby declare and make known that all the unlotted lands in said reservation, excepting such as have at that time been reserved for military, forestry, and other purposes, and such mineral lands as may have been disposed of under existing laws, will, on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

Commencing at 9 o'clock a. m., Tuesday, August 1, 1905, and ending at 6 o'clock p. m., Saturday, August 12, 1905, a registration will be had at Vernal, Price, and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration can not be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted

to make homestead settlement upon any of said lands, and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a. m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number and of the day upon which he must make his entry by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Commencing on Monday, August 28, 1905, at 9 o'clock a. m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to entry will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Persons who make homestead entry for any of these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person or persons desiring to found, or to suggest establishing, a town site upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the town site laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are not needed for town site purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands, except in the manner prescribed in this proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 14th day of July, in
[SEAL.] the year of our Lord 1905, and of the Independence of the
United States the one hundred and thirtieth.

THEODORE ROOSEVELT.

By the President:

ALVEY A. ADEE,

Acting Secretary of State.

OPENING OF THE UINTAH INDIAN RESERVATION LANDS IN THE STATE
OF UTAH.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, it was declared in my proclamation of July 14, in the year of our Lord 1905, prescribing the manner in which certain lands within the Uintah Indian Reservation should be opened to settlement and entry under the homestead and townsite laws of the United States, among other things, as follows:

Commencing on Monday, August 28, 1905, at 9 o'clock a. m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of; when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing;

And, whereas, there now appear to be ample reasons for a modification of said provision;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said act of Congress, and for the purpose of modifying the provision of said proclamation above quoted, do hereby declare and direct that said provision be modified to read as follows:

Commencing on Monday, August 28, 1905, at 9 o'clock a. m., the applications of those drawing numbers 1 to 111, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 112 to 222, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 2d day of August, in [SEAL.] the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

T. ROOSEVELT.

By the President:

ALVEY A. ADEE,

Acting Secretary of State.

REGULATIONS GOVERNING OPENING OF UINTAH RESERVATION IN
UTAH.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 15, 1905.

Register and Receiver,

United States Land Office, Vernal, Utah.

GENTLEMEN: The following regulations are hereby prescribed for the purpose of carrying into effect the opening of the Uintah Indian Reservation in the State of Utah, provided for in the act of Congress of March 3, 1905 (33 Stat., 1069), and in the President's proclamation of July 14, 1905, thereunder:

First. Applications either to file soldiers' declaratory statement or make homestead entry of these lands, must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to the General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, which fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior

with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendation, when the matter will be promptly decided.

Sixth. These regulations will supersede, during the sixty days from the opening of these lands, any rule of practice or other regulation governing the disposition of applications with which they may conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Seventh. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Give all possible publicity, through the press and otherwise, to these regulations.

W. A. RICHARDS, *Commissioner.*

Approved:

F. L. CAMPBELL, *Acting Secretary.*

UINTAH INDIAN LANDS—PERSONS NOT QUALIFIED TO ENTER.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 15, 1905.

The following persons are not qualified to make homestead entry of the lands of the Uintah Indian Reservation in Utah:

1. Any person who has made a prior homestead entry and is not entitled to make a second homestead entry. Under the act of June 5, 1900 (31 Stat., 267), any person who made a homestead entry and commuted the same prior to June 5, 1900, is entitled to make a second homestead entry; under the act of May 22, 1902 (32 Stat., 203), any person who made final five-year proof, prior to May 17, 1900, on lands to be sold for the benefit of Indians, and paid the price provided by law opening the land to settlement, and who would have been entitled under the "free homestead" law to have received title without such payment, had not proof been made prior thereto, is entitled to make a second homestead entry; under the act of April 28, 1904 (33 Stat., 527), any person who, prior to April 28, 1904, made homestead entry

but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a *bona fide* effort to comply with the homestead law and did not relinquish his entry for a consideration, is entitled to make a second homestead entry; under section 2 of said act any person who has made a homestead entry of a quantity of land containing less than 160 acres, and is still owning and occupying the same, may enter a sufficient quantity of lands contiguous to the lands embraced in his original entry to make up the full amount of 160 acres; under section 6 of the act of March 2, 1889 (25 Stat., 854), any person who has made a homestead entry for less than 160 acres, and has received the receiver's final receipt therefor, is entitled to enter enough additional land, not necessarily contiguous to the original entry, to make 160 acres.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the Army or Navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is claiming under any of the public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land, other than mineral land, which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS, *Commissioner*.

Approved:

F. L. CAMPBELL,

Acting Secretary.

MINING CLAIM—APPROXIMATION—SURVEY.

CHICAGO PLACER MINING CLAIM.^a

The rule of approximation permitted in entries under the homestead and other public-land laws providing for the disposal of nonmineral lands has no application to locations and entries under the mining laws.

A portion of an irregular legal subdivision is not sufficiently identified to enable the Department to accurately describe the same in a patent by an attempted description thereof in terms of the public-land surveys, and where patent is sought to a placer mining claim embracing a portion of an irregular legal subdivision or lot an official survey of the particular portion claimed will be required.

^a Not reported in volume 31.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 16, 1902.* (G. F. P.)

May 7, 1901, J. H. Sarsfield made entry for the Chicago placer mining claim, Leadville, Colorado, for certain lands described in the certificate of entry as "lots 1 and 2 in Sec. 3, the S. $\frac{1}{2}$ of lot 3 in Sec. 3, the N. $\frac{1}{2}$ of N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 3, the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 4 in Sec. 3, the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 3, the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 1 in Sec. 4, and the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 4, in township 8 south, range 78 west." By the public survey of said sections 3 and 4 (approved March 2, 1883) the quarter sections in which the Chicago claim is situated are represented to be fractional, the lands in the north half of each quarter section being designated as lots, each lot containing more than forty acres, while the lands in the south half of each quarter section are legal subdivisions of forty acres each.

By reason of approved surveys of certain lode and millsite claims, as shown by a diagram prepared and transmitted to your office by the United States Surveyor General, the areas of said lots 1 and 2 of section 3 have been reduced by several acres each. None of the land embraced in the surveys of the lode and millsite claims is included in the entry.

The Chicago claim appears to have been located February 21, 1901. The location embraces the land described in the certificate of entry. According to the public survey and the aforesaid diagram, the claim as located and entered contains an area of 165.03 acres. The area stated in the certificate of entry and paid for by the entryman is 160 acres.

April 5, 1902, your office, upon examination of the record, required the entryman to eliminate from the Chicago claim the area in excess of 160 acres, either by relinquishment of one of the tracts embraced therein, or by a survey of the claim. A motion for review, in which the entryman asked to be allowed to pay for the excess area under the rule of approximation usually applied to entries under the homestead laws, was dismissed by your office May 20, 1902. The entryman has appealed to the Department.

The rule of approximation under which persons seeking title to non-mineral public lands are permitted to pay for and include in an entry whatever excess there may be in the claims asserted over and above the amount limited by the law under which title is sought, provided such excess is not greater than the deficiency would be should a legal subdivision be excluded from the entry, is a rule of administrative expediency relating to entries under the homestead and other laws which provide for the disposal of lands by legal subdivisions only, and where a literal interpretation of the law would, by reason of irregular areas of legal subdivisions, resulting from una-

voidable causes in the public surveys, frequently limit the entryman to less land than he is entitled to enter under the law.

The laws providing for the location, entry and patent of public lands valuable for minerals are materially different from the homestead and other laws which provide for the disposal of non-mineral lands. By the latter laws (excepting the act of May 14, 1898, 30 Stat., 409, under which title may be acquired to unsurveyed lands in the District of Alaska, through soldiers' additional homestead rights, 28 L. D., 149-50) lands are disposed of after the public surveys have been extended over them, and only by the legal subdivisions of such surveys. Under the former, mineral lands may be located, entered and patented either before or after the public surveys have been extended to them, and, excepting as to placer claims, which if upon unsurveyed lands may be located and entered by legal subdivisions, and with respect to which it is provided that in all cases the locations "shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys," and that where such claims "cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands," it is not required that mineral lands shall be disposed of by legal subdivisions. See Secs. 2320, 2325, 2329, 2330 and 2331 of the Revised Statutes. By section 2330 it is provided that—

no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons.

In the administration of the placer mining law a literal interpretation may be given to the provision limiting the number of acres that may be included in a single location without working injustice to any claimant thereunder. Location and entry may be made according to legal subdivisions when the lands have been surveyed, or if the claim can not be conformed to legal subdivisions, survey and plat are provided for, as in the case of unsurveyed lands. A person seeking title under a placer location which embraces more than 160 acres suffers no loss of any portion of his entry right because required to reduce his claim to the number of acres allowed by law, for the reason that he may have the exact area to which he is entitled under the law described by a survey and plat, showing accurately the boundaries of his claim.

It follows from what has been said that there is no warrant for the application of the rule of approximation to locations and entries under the mining laws.

There is another objection to the entry not noticed in your office decision. Portions of the lands stated to be embraced in the entry are not described in such manner as to sufficiently identify them. These portions are referred to in the entry certificates as "the S. $\frac{1}{2}$

of lot 3 in Sec. 3," "the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 4 in Sec. 3," "the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 1 in Sec. 4," and are parts of irregular-shaped tracts designated as lots by the public survey. It would be impossible from the description given in the entry certificate to identify the lands claimed under the location and entry. This can be done only by a survey of the portions of said lots intended to be embraced in the entry. If the entryman shall elect to retain the lands claimed in said lots 3 and 4 in Sec. 3, and lot 1 in Sec. 4, or any portion or portions thereof, he must have a survey of the same made, so that the portion or portions retained may be properly identified.

No survey will be required as to ten-acre tracts of regular legal subdivisions or of entire lots, but where it is sought to embrace only a portion of such tracts or lots a survey of the same must be furnished as in the case of unsurveyed lands. In no event can the entry be allowed to stand for more than 160 acres of land.

Your office decision is therefore modified to conform to the views herein expressed.

PENDING SCHOOL INDEMNITY SELECTION—APPLICATION COVERING SAME LAND.

SANTA FE PACIFIC R. R. CO. *v.* STATE OF CALIFORNIA.

Pending the disposition of a school land indemnity selection, even though erroneously received, no other application including any portion of the land embraced in such selection should be accepted, nor will any rights be considered as initiated by the tender of any such application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) July 3, 1905. (F. W. C.)

The Santa Fe Pacific Railroad Company has appealed from your Office decision of December 10, 1904, rejecting its application, proffered under the act of June 4, 1897 (30 Stat., 36), to select the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 26, T. 28 N., R. 6 E., M. D. M., Susanville, California, land district, in lieu of an equal quantity of land relinquished to the United States in the San Francisco Mountains forest reserve, because of certain prior school indemnity selections made of said lands; also its applications to contest the State's selections covering these lands; the latter action being because of the fact that they were made by one H. D. Burroughs, admittedly not as initiating a contest in his own name to be prosecuted in his own interest, but as attorney for and on behalf of the Santa Fe Pacific Railroad Company.

With regard to the State's selection covering these lands, your office decision states that the selection of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 26, was

made on March 12, 1902, and that the selection of the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 26, was made on February 16, 1904. With regard to the last-mentioned selection, the fact is that the State's selection was made on October 10, 1903. The list filed on that date, including this tract, also embraced other selections, and, upon examination thereof, it was found that certain of the selections were improperly allowed, and the selection of those tracts was canceled, the State subsequently, on February 16, 1904, filing what is termed an amendatory list, embracing all the selections included within the original list, with the exception of those canceled, the selection in each instance being on account of the same basis assigned in the original list.

With regard to the State's selections, that of March 12, 1902, was on account of a part of section 16 lost to the State because the land in place was patented under the swamp land grant. With regard to the selection of October 10, 1903, the selection was claimed on account of a portion of a section 16 which had been previously withdrawn for examination and investigation with a view to its possible inclusion within a forest reserve.

The selections were accepted by the local officers, duly entered of record, and were pending undisposed of at the time of the proffer of the selection by the Santa Fe Pacific Railroad Company, and it was because of the pendency of such selections, and without regard to their validity, that your office and the local officers held that the land covered thereby was not subject to selection under the act of June 4, 1897, *supra*.

This action is affirmed. Good administration requires that, pending the disposition of a selection, even though erroneously received, no other application including any portion of the land embraced in said selection should be accepted, nor should any rights be considered as initiated by the tender of any such application.

With regard to the affidavits filed as the basis for the contest of the State's selections, your office decision rightly held that the applications presented were insufficient, and the action rejecting the same is also affirmed. The proffered selection of the Santa Fe Pacific Railroad Company will stand rejected.

**MOUNT RANIER FOREST RESERVE—YAKIMA INDIAN LANDS—ACT OF
DECEMBER 21, 1904.**

INSTRUCTIONS.

The authority conferred upon the Secretary of the Interior by the act of December 21, 1904, to sell and dispose of certain lands claimed by the Yakima Indians and adjoining their then-recognized reservation on the west, held to embrace such of said lands as fall within the limits of the Mount Ranier forest reserve.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *July 3, 1905.* (G. B. G.)

Referring to your office letter "R" of the 28th ultimo, I have to state that upon careful examination of the question therein submitted, it is clearly the opinion of this Department that the act of December 21, 1904 (33 Stat., 595), recognizes the claim of the Yakima Nation of Indians to that strip of country adjoining their then-recognized reservation on the west, "containing approximately two hundred and ninety-three thousand, eight hundred and thirty-seven acres according to the findings, after examination, of Mr. E. C. Barnard, topographer of the Geological Survey, approved by the Secretary of the Interior, April seventh, nineteen hundred;" that the Secretary of the Interior is authorized and directed to sell or dispose of all such lands, except such as may have been allotted or to which valid rights have not been acquired prior to March 5, 1904, by *bona fide* settlers or purchasers under the public land laws; and that this authority and direction embrace so much of said lands as falls within the limits of the Mount Ranier forest reserve, as established by executive proclamation of February 22, 1897. Your office will be governed accordingly in the administration of said act.

ISOLATED TRACT—PUBLIC SALE—NOTICE—CIRCULAR OF APRIL
11, 1895, AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 3, 1905.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Referring to the form of notice for publication to be used in public land sales, as prescribed by circular of April 11, 1895 (20 L. D., 305), I have to direct that hereafter when instructions are received from this office ordering into market, at public sale, any isolated tract or tracts of land, you will not only specify in such notice the day of the month and place for such sale, but also the hour of commencement of sale.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

LANDS SEGREGATED FROM YOSEMITE NATIONAL PARK AND INCLUDED
IN SIERRA FOREST RESERVE—RIGHT OF WAY—ACT OF FEBRUARY 7,
1905.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 7, 1905.

This act [February 7, 1905, 33 Stat., 702], so far as it relates to the use of the lands within the addition to the Sierra Forest Reserve made by it, for right of way purposes, is as follows:

Provided, That all those tracts or parcels of lands described in section one of the said act of October first, eighteen hundred and ninety, and not included within the metes and bounds of the land above described, be, and the same are hereby, included in and made part of the Sierra Forest Reserve: *And provided further*, That the Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land herein segregated from the Yosemite National Park and made a part of the Sierra Forest Reserve accorded under the act approved February fifteenth, nineteen hundred and one, relating to rights of way over certain parks, reservations, and other lands; and other acts concerning rights of way over public lands; and the moneys received from the privileges accorded on the lands herein segregated and included in the Sierra Forest Reserve shall be paid into the Treasury of the United States, to be expended, under the direction of the Secretary of the Interior, in the management, improvement, and protection of the forest lands herein set aside and reserved, which shall hereafter be known as the "Yosemite National Park."

SEC. 2. That none of the lands patented and in private ownership in the area hereby included in the Sierra Forest Reserve shall have the privileges of the lieu-land scrip provisions of the land laws, but otherwise to be in all respects under the laws and regulations affecting the forest reserves, and immediately upon the passage of this act all laws, rules, and regulations affecting forest reservations, including the right to change the boundaries thereof by Executive proclamation, shall take effect and be in force within the limits of the territory excluded by this act from the Yosemite National Park, except as herein otherwise provided.

The several acts of Congress authorizing the use of lands within forest reserves for right-of-way purposes are applicable to this portion of the Sierra Forest Reserve, with the condition, however, that the Secretary of the Interior may require the beneficiary to pay a suitable price for the privileges accorded therein.

The Department of Agriculture is vested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve, which occupation or use is temporary in character, and which, if granted, will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued. The Department of the Interior is vested with jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land. Any permission or license granted

by the Agricultural Department is subject to any later disposal of the lands by the Department of the Interior.

All applications for privileges other than of a temporary character within the said addition to the Sierra Forest Reserve should be in accordance with the regulations heretofore prescribed in similar cases. Before final approval is given to *any* application for a privilege on or over these lands, the Secretary of the Interior will fix the price therefor and the payment thereof will be necessary before final approval is given.

When the payment is made at the local land office, the receiver will charge the amount paid on his list of unearned moneys and deposit the same to his official credit until he is advised of the allowance or rejection of the application. If the application be allowed, he will cover the money into the Treasury *to the credit of the special fund provided for by this act, to be expended under the direction of the Secretary of the Interior in the management, improvement, and protection of the Yosemite National Park*; if rejected, the amount will be returned to the applicant and a proper receipt taken therefor.

In addition to the foregoing, and before such application will be approved, the applicant must expressly agree to enter into a contract whereby he shall bind himself to make further annual payments for such privilege should the Secretary of the Interior, upon consideration of the facts in each particular case, so prescribe. Such payments when required, shall be made to the Secretary of the Interior, to be placed to the credit of the special fund provided for in the act of February 7, 1905, to be expended in the management, improvement, and protection of the Yosemite National Park.

An applicant for the privilege of transporting persons and material through the reserve to the Yosemite National Park will also be required, when in the judgment of the Secretary of the Interior the convenience of the public requires it, to file in the Department a stipulation agreeing to transport the cars of any other person or company over its road upon the payment of such reasonable charge as may be determined upon between the parties, or by the Secretary of the Interior.

E. A. HITCHCOCK, *Secretary.*

LAND WITHDRAWN UNDER ACT OF JUNE 17, 1902--TOWNSITE.

INSTRUCTIONS.

Directions given relative to the survey, subdivision, appraisal and sale of certain lands in Idaho within the irrigable area of the Minidoka reclamation project, withdrawn from entry, except under the homestead law, for disposal in accordance with the provisions of the act of June 17, 1902, and subsequently reserved by the President, under section 2380 of the Revised Statutes, as a town site.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 8, 1905.* (E. F. B.)

Your reports of May 23, 1905, and June 16, 1905, as well as the reports of the Director of the Geological Survey of May 3, 1905, June 1, 1905, and June 3, 1905, relative to the survey and sale of certain lands in Idaho that have been reserved by the President under section 2380, Revised Statutes, as a townsite, have been considered by the Department.

The lands reserved are all of section 15, except the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, and lots 3 and 4, section 22, T. 10 S., R. 23 E., B. M., Hailey, Idaho, containing in the aggregate 632.70 acres. The order of reservation also improperly embraced lands in section 16, belonging to the State of Idaho, but the order was ineffective as to those lands, as the United States had no jurisdiction and control over them, and they should not be considered in making the survey of the townsite.

The lands being within the irrigable area and susceptible of reclamation from the irrigation works of the contemplated Minidoka project, had formerly been withdrawn from entry, except under the homestead law, for the purpose of being disposed of only in conformity with the provisions of the act of June 17, 1902 (32 Stat., 388), and were thus placed directly under the control of the Reclamation Service. Subsequently, upon the recommendation and advice of the Director of the Geological Survey that the lands in question were suitable for townsite purposes and would become a center of population, they were reserved by the President under the following section (2380) of the Revised Statutes:

The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

They were thereupon taken from under the immediate jurisdiction and control of the Geological Survey and were restored to the control of the General Land Office, as the bureau provided by law for supervising the survey and sale of such reservations as public lands of the United States under the following provision (2381) of the Revised Statutes:

When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof; and all such sales shall be conducted by the register and receiver of the land office in the

district in which the reservation may be situated, in accordance with the instructions of the Commissioner of the General Land Office.

It being desirable that the lands reserved should be opened for occupancy as early as practicable, it becomes the duty of this Department to have them surveyed and subdivided into suitable lots, blocks, streets, alleys and necessary reservations for public uses and to have the lots appraised at their cash value and offered for sale at public outcry to the highest bidder, and to provide by appropriate regulations for the disposal at private entry of the lands remaining unsold at the public offering.

You will therefore take immediate steps to have the exterior boundaries of the reservation surveyed without regard to the State lands adjoining, and to have the lands so segregated subdivided into streets, alleys, blocks and lots and to lay out such reservations for public parks as may be desirable for public use, due regard being had to the future necessities of the inhabitants of the townsite. You will have the lots appraised by disinterested persons at their cash value and have them offered for sale at public outcry to the highest bidder for cash, the sale to be conducted by the register and receiver in accordance with such instructions from your office as may be given.

The Director of the Geological Survey submits with one of his reports a plat of a proposed subdivision of the townsite, which, as to the streets, alleys, blocks, lots and reservations for parks indicated thereon, appears to be free from objection, and no reason appears why the suggestion may not be accepted by your office and the survey be made accordingly. It is not intended by this suggestion to restrict your office in the exercise of its judgment, but you are free to make such recommendation as may seem advisable.

There is no authority under the act to make the other reservation indicated upon the plat. The dedication of portions of the reservation for public parks may be exercised as a necessary incident to the power to lay out streets and alleys for the public use, but the law evidently contemplates that the lots and blocks shall be sold to the highest bidder unless reserved for government purposes.

The plat indicates that certain lots are to be used for particular purposes. The suggestion merely indicated the reason for restricting the area of the lots thus designated, and not that such condition be imposed at the sale, as there is no authority to prescribe the purpose for which any lot must be used.

In having the townsite surveyed you may make use of such service as the Reclamation Service may be able to render, but it must be made under your direction and subject to your approval. The mere fact that the land reserved is within the irrigable area of an irrigation project and susceptible of reclamation, makes no difference in the

proceedings for the disposal of the lands. They must be disposed of as all other lands reserved for townsite purposes under section 2380.

After the approval of the survey, the lands will be offered for sale to the highest bidder for cash after the usual notice, and the land remaining unsold at the public offering will thereafter be subject to private cash entry under such regulations as may hereafter be prescribed. There is no authority to sell any such lands except for cash. The law requiring that they shall be appraised at their cash value, necessarily implies that they shall be sold for cash.

NORTHERN PACIFIC RAILWAY CO.

Motion for review of departmental decision of June 8, 1905, 33 L. D., 601, denied by Acting Secretary Campbell, July 12, 1905.

RIGHT OF WAY—ALASKAN LANDS—SEC. 6, ACT OF MAY 14, 1898.

A. B. W. MINING COMPANY.

The provisions of section 6 of the act of May 14, 1898, conferring upon the Secretary of the Interior authority to sell to the owner or owners of a wagon road or tramway, not to exceed twenty acres of public land, for terminal facilities, at each end of the road, contemplates the sale of an absolute fee in the lands, and where the lands, at the date applied for, are included within a forest reserve, they are not subject to sale under said section, notwithstanding the wagon road or tramway in connection with which they are desired may have been constructed prior to the creation of the reserve.

In view of the provisions of the act of February 1, 1905, transferring to the Secretary of Agriculture the execution of certain laws affecting public lands within the limits of forest reserves, and the construction placed upon that act by the Secretary of the Interior and concurred in by the Secretary of Agriculture, applications for permits for use of rights of way within forest reserves on account of wagon roads or tramways, under section 6 of the act of May 14, 1898, come within the jurisdiction and control of the Secretary of Agriculture.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 12, 1905.* (F. W. C.)

The A. B. W. Mining Company has appealed from your office decision of May 3, 1904, refusing to submit, with favorable recommendation, its application for the issue of a permit under section 6 of the act of May 14, 1898 (30 Stat., 409, 411), on account of its constructed tramway, as shown upon its map accompanying its application, having a length of 1.59 miles, and rejecting its application to purchase

two certain tracts of land, as terminals to said tramway, covering 11.886 acres and 20 acres, respectively, for the reason that the lands affected by the several applications are within the limits of the withdrawal made by proclamation August 20, 1902, creating the Alexander Archipelago Forest Reserve in the Juneau land district, Alaska, said reserve having been created under the provisions of section 24 of the act of March 3, 1891 (26 Stat., 1095).

In its appeal the mining company claims to be the owner of certain mining properties on Prince of Wales Island, Alaska, about one mile from the shore of Hollis Bay and on an arm of Kassan Bay; that during the autumn of 1901 the company constructed a tramway from its mill and reduction works to the beach, which was prior to the creation of the forest reserve, and it is urged that the subsequent action creating such reserve should not affect its rights previously acquired under the act of 1898.

By section 7 of the act of 1898 it is provided:

That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by act of Congress.

Section 6 of the act of 1898 provides that the Secretary of the Interior may issue a permit by instrument in writing authorizing the use of a right of way over the public domain in the district of Alaska for the construction of wagon roads and tramways. By the same section the Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway not to exceed twenty acres of public land at each terminal, at the rate of \$1.25 per acre, evidently designed for terminal facilities. The right given under a permit for use of right of way issued under this section for the construction of a wagon road or tramway, is separate and distinct from the right to purchase grounds for terminal facilities. The latter contemplates an absolute fee in the lands, and the fact that such lands are, at the date applied for, included within a forest reserve is a sufficient bar to the purchase. Your decision, in so far as it rejected the applications for terminal grounds, is, for that reason, affirmed, and in this connection it is noted that the lands applied for seem to be largely in excess of what would seem to be needed when the actual length of the road is considered.

With regard to the application for permit for the use of the right of way actually occupied by the constructed tramway, in view of the provisions of the act of February 1, 1905 (33 Stat., 628), transferring to the Secretary of the Department of Agriculture the execution of certain of the laws affecting public lands within the limits of forest reserves, the departmental letter of June 8, last, addressed to the Secretary of Agriculture, defining the jurisdictions of the two depart-

ments over the granting of rights and privileges within such reserves, and of the letter from the Secretary of Agriculture, dated June 13, last, assenting, this Department is of opinion that the question as to the future occupation of the reserve by the tramway in question is a matter for consideration by the Secretary of Agriculture, and, for this reason, it is directed that the papers relating to the application in question be forwarded to the Secretary of Agriculture, with a copy of this decision, and that the applicant company be fully advised in the premises.

MILITARY BOUNTY LAND WARRANT—UNOFFERED LAND—EQUITABLE ADJUDICATION.

ROY McDONALD.

Where the only objection to confirmation of a military bounty land warrant location, made in good faith, is the purely technical one that through inadvertence of the land department the land covered thereby was never formally offered at public sale under the provisions of the act of July 4, 1876, as it should have been, of which fact the locator was ignorant, the location may be referred to the Board of Equitable Adjudication for confirmation under Rule 11.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 12, 1905.* (J. R. W.)

Roy McDonald appealed from your decision of November 25, 1904, requiring him to show cause why his location of bounty land warrant 115,547 should not be canceled as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 6, T. 4 S., R. 22 W., La. M., New Orleans, Louisiana.

April 7, 1903, Roy McDonald located military bounty land warrant 115,547, one hundred and sixty acres, on the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 6, T. 4 S., R. 22 W. The warrant was issued under the act of March 3, 1855 (10 Stat., 701), to the widow of a soldier of the First Mississippi Volunteers, for service in the Mexican war, and was locatable only on lands subject to entry at the minimum or graduated price.

All the land located was by the act of June 21, 1866 (14 Stat., 66), withdrawn from disposal except under the homestead law, and upon repeal of that restriction by the act of July 4, 1876 (19 Stat., 73), it was provided:

That the repeal of said section shall not have the effect to impair the right, complete or inchoate, of any homestead settler, and no land occupied by such settler at the time that this act shall take effect shall be subject to entry, preemption, or sale: *And provided*, That the public lands affected by this act shall be offered at public sale as soon as practicable, from time to time, and according to the provisions of existing law, and shall not be subject to private entry until they are so offered.

The subdivision here in question never was offered at public sale under the act of 1876, *supra*, and your office held that by express terms of that act it did not again become subject to entry and was not subject to location under the warrant.

The appeal alleges error in holding that a military bounty land warrant will not take an unoffered tract of public land which is generally subject to disposal under the general laws.

The restriction of the right of location to land subject to private entry was, as the law then stood, for protection of the United States against appropriation of public lands before it had opportunity to realize a better price by offering its lands at public sale. What was intended was to grant as a bounty so much land as was expressed in the warrant of lands subject to private appropriation generally at the minimum or lower graduated price. The provisions of the act of 1876, *supra*, had no other purpose than to protect settlers and to protect the United States in obtaining a higher price, by another offer at public sale. The latter object has been abandoned and the land can not be offered, since the act of March 2, 1889 (25 Stat., 854), withdrew all lands from sale except in the State of Missouri. There is no doubt but that the location was made in good faith, that the case is meritorious, and that objection to approval of the location is purely the technical one that the land, through some inadvertence of the land department, was never formally reoffered under the act of 1876, of which fact the locator was ignorant.

In view of the Department the case is therefore within the principles announced in the cases of *J. M. McDonald* (15 L. D., 257), and *Pecard v. Camens et al.* (4 L. D., 152), and the case will be referred to the Board of Equitable Adjudication for confirmation under the 11th rule, promulgated October 3, 1846.

SWAMP LAND—ADJUSTMENT—CHARACTER OF LAND.

CULLIGAN *v.* STATE OF MINNESOTA.

In the adjustment of all claims for public lands in the State of Minnesota initiated in accordance with law prior to survey of the lands, in instances where selection thereof is made by the State under its swamp land grant, and the field notes of survey afford a sufficient basis for such selection, the land department will, by hearing or otherwise, determine the true character of the lands, notwithstanding the return of the field notes of survey of the township.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 13, 1905.* (G. B. G.)

Departmental decision of April 14, 1904 (not reported), affirmed your office decision of June 17, 1904, which rejected the application

of Patrick Culligan to contest the swamp land selections of the State of Minnesota to certain lands in sections 25 and 26, township 57 north, range 8 west, Duluth land district, Minnesota, more particularly described in your said office decision. A motion for review of this decision was filed by Culligan and duly entertained, November 29, 1904.

The decision complained of was ruled under direction No. 2 of the general regulations given by this Department March 16, 1903 (32 L. D., 65), for the future adjustment of the swamp land grant to the State of Minnesota, which direction was as follows:

(2) All existing contests or controversies in which there is no claim of actual and *bona fide* homestead or pre-emption settlement, will be disposed of under the original plan of following the field notes, there being nothing in such contests or controversies which would equitably entitle the claimants adverse to the State to have the contest disposed of under the rule announced in the Lachance decision.

Direction No. 1 of these same regulations provides that all existing contests and controversies between the State and an actual and *bona fide* homestead or pre-emption settler shall be disposed of under the rule announced in the "Lachance decision" (4 L. D., 479), which was, by ordering a hearing, to afford such homestead or pre-emption claimant an opportunity to prove the character and condition of the land involved at the date of the swamp land grant to the State of Minnesota. There is also a further direction (No. 4) which provides that all contests or controversies thereafter begun (after March 16, 1903), respecting the swampy or non-swampy character of lands in said State, whether theretofore or thereafter surveyed, shall be determined by the field-notes of survey.

The motion for review admits that the decision complained of is in strict accord with these regulations, but asks that the regulations be reformed.

After most careful consideration, and upon a more comprehensive view of the subject, it is believed that the regulations in question should be amended to afford relief in cases of the character here presented.

The claim of Culligan arose upon certain forest lieu selections under the act of June 4, 1897 (30 Stat., 11, 36), and a selection by the Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat., 993, 994), and upon the subsequent assignment of the claims to him. The acts in question authorized the selection of unsurveyed lands, and the selections in question were in fact made prior to the survey of the township in which they are situated, and were in fact a mere exchange of lands. At the date of the selections it was not known, and not possible to know or surmise, that the field-

notes of the survey to be thereafter made would designate these lands as swamp. The selectors, therefore, were without other notice of the character of this land than such as resulted from an examination upon the ground. It is sufficiently alleged that such examination was made and showed the land in controversy to be high and dry, and not swamp, and movant asks that he be permitted to show this at a hearing.

It is thought that in equity and good conscience this should be done, and it is so ordered.

In the further adjustment of all claims heretofore or hereafter initiated in accordance with law for public lands in the State of Minnesota, prior to the survey thereof, in instances where a selection of such lands is made by the State under its swamp land grant, and the field-notes of survey afford a sufficient basis for such selection, your office will, by hearing, or otherwise, determine the true character of the land, notwithstanding the return in the field-notes of survey of the township.

TOWNSITE ENTRY—TRUSTEE—SECTION 2387, REVISED STATUTES.

BENA TOWNSITE.

The term "judge of the county court for the county," employed in section 2387 of the Revised Statutes to designate the officer authorized to make townsit entry under said section, as trustee for the several use and benefit of the occupants of the townsite, embraces any presiding judicial officer of a court having jurisdiction within the county; and where any one of several officers coming within the purview of the statute is designated by the State legislature as the proper officer to assume the trust and make the entry, such designation is entitled to be recognized by the officers of the land department.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 13, 1905.* (J. R. W.)

The Bena Townsite settlers appealed from your decision of April 14, 1905, rejecting the application of W. S. McClenahan as "Judge of the District (County) Court in and for Cass County, Minnesota," to make entry of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 27, and NE. $\frac{1}{4}$, Sec. 34, T. 145 N., R. 28 W., 5th P. M., Cass Lake, Minnesota, as the Bena Townsite.

The only matter presented by the appeal is the question whether under the laws of the United States and of Minnesota the judge of the district court having jurisdiction within the county wherein is an urban settlement upon public lands, or the probate judge of such county, is the proper officer, as trustee to the several use of the occupants, to make the townsite entry.

October 27, 1903, there was filed in the local office the declaratory statement of "W. S. McClenahan, Judge of the District (County) Court, in and for Cass County," Minnesota, that:

about twenty persons have on the 19th day of October, 1903, settled upon and occupied as a townsite the description . . . and I do hereby declare my intention to claim the said tracts of land as and for a townsite in trust for the several use and benefit of the occupants thereof, according to their respective interests.

November 22, 1904, the local office rejected the application, because (1) the land was not subject to townsite entry, and (2) that applicant as district judge is not authorized to make such entry. December 23, 1904, he appealed to your office.

June 27, 1904, J. G. McGarry, "judge of the probate (county) court of Cass county, Minnesota," filed a like statement, which the local office rejected, June 29, 1904, because it was instructed, December 2, 1903, to allow no entries, or other disposition of these lands, which were temporarily withdrawn and reserved for forestry purposes under the act of June 27, 1902 (32 Stat., 400, 402). McGarry took no appeal.

April 14, 1905, your office affirmed the action of the local office, and held that the—

judges of the District Courts of Minnesota are not authorized under sections 2387 and 2388, U. S. Rev. Stat., to act as trustees for townsite occupants of the public land . . . but their action in rejecting the declaratory statement filed by Judge McGarry is hereby reversed.

May 15, 1905, Judge McClenahan withdrew his application, and June 10, 1905, notified the local office that such action was inadvertent and should not be considered as effective. June 13, 1905, he filed his appeal and authority to counsel to represent him before the Department.

Section 2387 of the Revised Statutes of the United States provides:

Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

The term "county court" is clearly not intended to be the name of a particular court, for the statute is general and is intended to be operative in all States where there are public lands, and in many such States, as Minnesota, there are no courts known by that name. The

words "judge of the county court for the county" can have no other meaning than the presiding judicial officer of a court having jurisdiction within the county. In designating the judge of the county court Congress sought to assure that the trustee should be a person of sound discretion and integrity.

The statute does not provide for the administration of the trust, but merely for protection of the interests of the United States in requiring payment for the lands thus appropriated by urban settlement. It leaves the administration of the trust arising from a community appropriation of public lands to the local authority, by providing that the trustee shall administer his trust "under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Under the judicial system of the State of Minnesota there is no court named the county court. There exist at least three courts which are county courts, and have original jurisdiction to adjudicate rights of persons or rights in property arising in the county within which and for which they sit. The district court has original jurisdiction of all civil causes involving more than one hundred dollars and of criminal causes punishable by fine of more than one hundred dollars, or imprisonment for more than three months; (2) justices of the peace whose jurisdiction is limited to causes below that of the district court and not involving title to real estate; (3) the probate court with jurisdiction of estates of decedents and persons under guardianship. While the legislature is empowered to establish other courts, and so might have established a county court by name, it has not done so, and the district court is the only court under the judicial system of that State having general civil and criminal jurisdiction throughout the county. It may more appropriately be regarded as *the* county court than either of the others, the jurisdiction of which is inferior and more narrowly limited.

The legislature by an act now codified under chapter 42, Official Trusts, Statutes of Minnesota 1894, section 4255, has provided:

When the corporate authorities of any town, or the judge of the district court for any county in which any town is situated, enter, at the proper land-office, the land or any part of the land settled and occupied as the site of such town, pursuant to and by virtue of the provisions of the act of congress, entitled "An act for the relief of the citizens of towns upon the lands of the United States under certain circumstances," passed May 23d, A. D. 1854, such corporate authorities, or judge (as the case may be), shall dispose of and convey the title to such lands, or to the several blocks, lots, parcels or shares thereof, to the persons hereinafter described, and in the manner hereinafter specified.

This act recognizes the judge of the district court of the county to be the proper person and the officer under the judicial system of that

State intended and designated by the act of Congress as judge of the "county court." The date of this act is not given, but it is clear that this legislation was of early date, as it appears in the case of *Village of Mankato v. Meagher* (17 Minn., 265, 270), that the townsite of the village of Mankato was entered by the district judge, trustee, March 21, 1856, and in *Carson v. Smith* (12 Minn.—Spencer—546, 552), the townsite of Winona was entered by the district judge as trustee August 16, 1855. It thus appears that the district court judge was not only recognized by the State legislature to be "the judge of the county court" within the meaning of the townsite act, but that the land department at least fifty years ago also recognized him as the proper officer in that State to make entry under the statute. No reason appears to make a change in the practice that has now obtained for more than half a century and under which rights have grown up.

Nothing in the published departmental decisions is inconsistent with regarding the judge of the district court, in Minnesota, as the "judge of the county court" within the meaning of the townsite legislation of Congress. The case of *Woodruff Townsite* (15 L. D., 205) arose in Utah Territory, and the townsite entry was made by the probate judge. There existed in that Territory no court named by law "the county court." The legislature of Utah provided that for the purpose of selections of townsites the probate judge of any county "shall be deemed and is hereby designated as the judge of the county court for such county." There were then in Utah two courts of jurisdiction throughout the county: (1) the district court of general jurisdiction, and (2) probate courts with jurisdiction in decedents' estates, guardianship, "and like matters," and in divorce. In designating the probate judge as judge of the county court for purposes of townsite entry, the legislature did no more than to designate which one of two official incumbents it deemed the proper officer to be charged with the trust. The land department accepted that designation made by the local legislative authority.

In *Cofield v. McClelland* (16 Wall., 331), Congress specially authorized the probate judge of Arapahoe county to make the entry (13 Stat., 94). As Congress had plenary power, the case is not pertinent here. Congress might name any person or officer as such trustee, and his acceptance of the trust would authorize such entry. In Montana, there being no "county court" by name established by law, the local legislature (Laws of Montana, 1869, p. 80) designated "The judge of the probate court" as the proper officer to make townsite entry. In *Ashby v. Hall* (119 U. S., 526), in an action of ejectment wherein title and the validity of the entry were necessarily involved, the court upheld an entry made by such officer.

In Kansas there was no county court established with such name. The probate court was limited to settlement of estates of decedents, matters of guardianship, indenture of apprentices and habeas corpus (Compiled Laws, Kansas, 1873, p. 325). The act of October 31, 1868 (ib., 1873, p. 972), made it the duty of the probate judge to make townsite entries. In *McTaggart v. Harrison* (12 Kan., 62, 66) the court held that a townsite entry made by such officer was lawful under the laws of the United States, and his duty under the State law. *Sherry v. Sampson* (11 Kansas, 611) was an action of ejectment to recover possession of a lot in a town entered by the probate judge. The court held:

The "probate court" in one sense is a "county court." And it would seem from the action of the government that the words, "county court," as used in said act, were intended to mean any county-court by whatever name such court might be known, and whether it was a county court for probate matters only, or whether it was a county court for general, common-law, chancery, or other jurisdiction.

No well considered decision known to the Department is inconsistent with this view. The purport and intent of the townsite act is that an entry in trust to the several occupants shall be made by the judge of a court having jurisdiction over the county where the land lies. This fulfils all the conditions respecting the qualification of the trustee. If there be several such persons, judges of different courts having jurisdiction over the county, no objection lies in any legislation of Congress against designation of the particular officer by local law, as was done in the Colorado and Kansas cases. It is not an objection that the legislature of Minnesota designated the judge of the district court, instead of following the legislatures of Utah and Kansas by designating the probate judge. Had those States designated the presiding officer of some other court of jurisdiction over the county, such designation would have been equally conclusive.

So that the officer designated by local authority is within the general description of the act of Congress and is the judge of a judicial tribunal having jurisdiction of the county wherein the townsite is situated, all requisite conditions imposed by Congress are met, and such designation is entitled to be recognized by the officers of the land department. In the particular case here, the judge of the district court, and not the judge of the probate court, was charged with the duty of assuming the trust and making the entry, and his application should be received and that of McGarry rejected.

Your decision is reversed.

ARID LAND—DESERT LAND ENTRY—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Lands held by virtue of a desert land entry are held in private ownership within the meaning of the act of June 17, 1902, and the entryman or his assignee is entitled to the same rights and privileges and is subject to the same conditions and limitations, so far as the right to the use of water is concerned, as any other owner of lands within the irrigable area of an irrigation project constructed under the provisions of said act.

Acting Secretary Campbell to the Director of the Geological Survey,
(S. V. P.) *July 14, 1905.* (E. F. B.)

The Department has considered the suggestions contained in your letter of June 6, 1905, relative to the right of a desert land entryman to subscribe for a right to the use of water from irrigation works to be constructed by the government under the act of June 17, 1902 (32 Stat., 388).

It is assumed that the land referred to is within the irrigable area of a contemplated project, but having been entered prior to withdrawal is not subject to disposal under the provisions of the reclamation act and can only be brought under its provisions by cancellation of the entry, from voluntary relinquishment or otherwise, in which event it would immediately become subject to disposal only under the provisions of that act, according to such units and areas as may be prescribed by the Secretary of the Interior.

An incipient entry under the desert land act confers more than an inchoate right. The act requires part payment of the purchase money with the initial entry, which thereby vests in the entryman an equitable right to the land, subject to be divested by failure to perform conditions subsequent, in which event the act declares "the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled."

Until such forfeiture has been incurred, the entryman has an equitable right or interest in the land which can be ripened into a perfect title by fulfilling the conditions required by the act, and may transfer and assign such right and interest in the entry to another, who will by such assignment succeed to all the rights and interest and assume all the obligations of the original entryman.

While such entrymen or assignees are not invested with the legal title, they have such an equitable right and interest in the land as to constitute them proprietors within the spirit and purpose of the act of June 17, 1902, and the right to the use of water may be granted to such proprietors if they bring themselves within that provision of the act that "no right to the use of water for land in private own-

ership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land."

If the entry is for more than 160 acres of land, the entryman cannot secure the benefit of the act unless he relinquishes the excess, as no assignment of a portion of the entry will be recognized. (Luther J. Prior, 32 L. D., 608.)

With regard to the limit of time for making final proof under the desert land act, it is not advisable to anticipate that question. The same difficulty is presented in entries under the homestead law. All that is necessary to determine at present is that lands entered under the desert land law are to be considered as lands in private ownership and the entryman or assignees under such entries are to be treated in the manner contemplated by the act for the owners of lands.

RESIDENCE—ABANDONMENT—OFFICIAL EMPLOYMENT.

RAY *v.* SHIRLEY.

The fact that a homestead entryman holds an official position the duties of which are required to be performed at some place other than on the land embraced in his entry, constitutes no sufficient excuse for his absence from the claim, unless it be shown that his absence is actually due to his official position or employment.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 17, 1905.* (E. P.)

June 17, 1899, Edward E. Shirley made homestead entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, T. 17 N., R. 21 W., Kingfisher land district, Oklahoma, against which entry Walter S. Ray, on June 1, 1903, filed an affidavit of contest, charging that the entryman—

for on or about two years last past and next prior to this date has not resided upon said land, but has made his home in the town of Grand, O. T., with his family; that he has abandoned residence on said land for on or about two years last past, and has offered to sell to divers parties and is now holding it for sale and offering it on the market; that he has not made his home on the land for about 2 years last past, but lived with his family elsewhere, and that said alleged absence from the said land was not due to his employment in the Army, Navy, or Marine Corps of the United States, etc.

Notice issued June 1, 1903, citing the parties to appear before the local officers September 8, 1903, and submit testimony, which notice was, on July 12, 1903, duly served upon the defendant at the town of Grand, Oklahoma. After various proceedings not necessary to be

here set forth, the testimony on behalf of the plaintiff was submitted before the local officers November 20, 1903, and that on behalf of the defendant, December 7, 1903, before the clerk of the District Court of Day County, Oklahoma, the respective parties being represented at both places by attorney.

The local officers found that the defendant had fully complied with the requirements of the homestead law, from the date of his entry until about the first of October, 1901, when, having been asked by the sheriff of Day County, the county wherein the land involved is situated, to become a deputy or under-sheriff, the defendant removed to the town of Grand, the county seat of Day County, and was appointed deputy or under-sheriff, the duties of which office required him to reside at the county seat; that he continued to hold this office from the date of his appointment thereto until the filing of the affidavit of contest, during which time he cultivated the land embraced in his entry. They held that the defendant's residence in the town of Grand, being necessary in order to enable him to perform the duties of the office of under-sheriff, should be construed to be constructive residence on the land, and that, therefore, his absence from the land was, under the circumstances, excusable, citing the case of A. E. Flint (6 L. D., 668), wherein it was held (syllabus) :

When a *bona fide* settler has established a residence, and is afterwards called away by official duty which requires his presence at the county seat, such absence shall not work a forfeiture of his rights.

The local officers therefore recommended that the contest be dismissed.

On appeal by the plaintiff, the action of the local officers was, by your office decision of January 24, 1905, affirmed, from which decision the plaintiff now appeals to the Department.

The testimony in this case shows that between June 17, 1899, the date of his entry, and October 1, 1901, the defendant placed on the land the following improvements: a half dugout, fourteen by sixteen feet and about eight feet high, built of boxing lumber, and containing a door, two half windows, and a "gyp" floor; an open straw-covered shed, ten by twenty-eight feet, used as a stable; a storm cave or dugout, ten by ten feet, with one door; a drilled well, something over 100 feet deep, cased with tubing and supplied with a pump; another drilled well about 90 feet deep, from which no water was obtained; a piece enclosed by three-wire fence, and used as corral; feed racks for stock; about 100 acres enclosed by two-wire fence; between fifty and sixty acres of breaking; and an orchard covering about an acre, planted in the spring of 1901, but which was killed by dry weather or by stock before the fall of that year. These improvements are variously estimated by the witnesses to be worth from

\$300 to \$1200, the preponderance of the testimony, however, being to the effect that they are worth between \$500 and \$600.

In July, 1899, the defendant established his residence on the land, and thereafter continuously resided there until October 1, 1901, during which time he appears to have been engaged in cultivating about fifty acres of the land, caring for his stock, consisting of about fifty head of cattle and a pair of mules, and conducting a store in a building on his land, wherein he sold dry goods, groceries and drugs, and also had a postoffice, of which he was postmaster.

In the spring of 1901, the defendant, owing to the operation of the "herd law," was compelled to send what is called his "stock" cattle away from the vicinity of the land for pasturage. It further appears that about July, 1901, he resigned the office of postmaster and disposed of his stock of merchandise, and the building in which the store and postoffice was conducted, to one Bridwell, who thereupon removed the building from the land.

October 1, 1901, the defendant moved with his family, consisting of his wife and two children, to the town of Grand, the county seat of Day County, the county wherein the land is situated, and opened a drug store. About two weeks after removing to Grand, the sheriff of Day County appointed the defendant under-sheriff, and since removing to Grand he has continuously resided there with his family, conducting his drug business and performing such duties as were from time to time assigned to him by the sheriff, in the meantime making infrequent visits, each of very short duration, to the land. During this period the land was either rented or a portion thereof cultivated on shares. No additional improvements were placed on the land by or for the defendant after he removed therefrom, October 1, 1901.

Plaintiff's witness J. D. Howard, testifies that prior to leaving the land the defendant stated to him that he could not make any money farming; that after the defendant had removed to Grand the witness had a conversation with him in his drug-store during the course of which the defendant asked the witness if he knew of anyone who would buy his land, stating that if the witness could find, or send him, such a purchaser, he would pay the witness for so doing.

Plaintiff's witness W. H. Clem, testifies that about a year prior to moving away from the land the defendant had tried to sell the claim, that he told witness to sell it for him; that he instructed witness to sell it for \$1,000, offering witness \$50 if he could find a purchaser; that the defendant appeared to be very anxious to get away; that on one occasion, in the spring of 1903, when the witness was in the defendant's place of business, the defendant told the witness that "he was deputized deputy sheriff so that he wouldn't have to stay on his farm."

Plaintiff's witness J. W. Brown, testifies that shortly after the defendant moved to Grand, the defendant told the witness that "he had been sworn in as deputy to hold his claim down, or to help him hold his claim down, or something like that."

Plaintiff's witness W. L. Howard, testifies that the defendant has told him several times that the land was for sale, that he wanted to sell it; that the defendant said he was no farmer; that early in the spring of 1903, the witness had a conversation with the defendant at his place of business in Grand, when the defendant said that "if it wasn't for holding his place down, he wouldn't have that office and a dollar."

The defendant testifies that he first went to Grand about September 1, 1901; that he was then looking round to see if he could get something to do, and had previously had some conversation about the drug business; that on the occasion of this visit to Grand he partially engaged the room afterwards occupied by him as a residence and drug store, and after his return home he notified the owners of the building that he would take the room; that his commission as under-sheriff was dated about October 10, 1901; that during the first year that he was in Grand he does not know whether he spent the greater part of his time attending to his drug business or not; that he always attended to the duties of under-sheriff first; that he would not swear that during the first ten months that he conducted the drug business at Grand, he spent on an average two days a week in the sheriff's office or in working under the sheriff; that he has never kept account of the time spent by him in the performance of official duties; that he was offered the position of under-sheriff about September 1, 1901, when on his first visit to Grand; that his purpose in holding the office was that he thought he could make some money out of it; that he has never told Brown, the plaintiff's witness, that he was holding the office of under-sheriff in order that he might be enabled to remain off the land; that he was not holding his land for sale on June 1, 1903; he was asked if it is not true that about the time he made up his mind to move away from the land, either before or since such removal, he had not told someone that he wanted to sell his homestead, and replied: "I might at some time when discouraged made some off handed remark like that; I don't know."

Sheriff Smith testified on behalf of the defendant as follows:

Q. What are the duties of under-sheriff, or some of them?

A. It is his duty to care for the office in my absence and do any work that I can do as sheriff.

Q. How long has Mr. Shirley been under-sheriff, if you know?

A. I don't know as I know just the date; it was about a week, maybe two weeks, after he moved to Grand that I put him in as under-sheriff.

Q. Had he done any special deputy work for you prior to that time?

A. He had.

Q. How many deputies have you working under you or have you had for about the last two years and prior to the first of last June?

A. Eight, I think; that is, eight all the time.

Q. Do you divide the work equally between these deputies, or have you one or two that does the most of the work for you?

A. Mr. Shirley does most of the work.

Q. In the last two years can you state about the amount of fees earned by Mr. Shirley as under-sheriff as shown by your books?

A. He is on a salary of twenty dollars per month and he gets his fees when his cases is settled, and I have never run them up to see how much it is.

Q. Has he been a good, competent deputy or under-sheriff since holding that office, under you?

A. He has.

Q. Have you ever called upon him to do any official work since he held that office that he has refused to do?

A. I have not.

* * * * *

Q. Did Mr. Shirley solicit the commission or did you give it to him of your own selection?

A. I gave it to him of my own selection; when I first talked to him about taking the commission he said he didn't know whether he would like the work or not, and afterwards I got him to take it.

Q. When was this talk with him that you speak of; was it before he moved to Grand, or after?

A. It was before he moved.

Q. Why did you want him to take a commission under you?

A. He was talking of coming to town to go into the drug business and at that time there was no one in Grand suitable to fill that position outside of men that was in business and none of them would accept it.

CROSS-EXAMINATION.

* * * * *

Q. I will ask you if during the first few months, say "or a period of from four to six months after Mr. Shirley moved to town, if Virgil Williams wasn't remaining in town and remaining off from his homestead on the strength of the fact that he held a commission of deputy under you?

A. He was in town, and done some work as deputy sheriff, but wasn't remaining off from his place on account of holding the commission. He was on his place part of the time and part of the time in town.

* * * * *

Q. I will ask you if during the first year or more after Mr. Shirley moved to Grand, if Alex Hutchinson, who remained in Grand all of the time and held a homestead ten miles or more from Grand, was not a regularly appointed deputy sheriff under you?

A. Mr. Hutchinson was at work for—part of the time he worked for Bigelow and Hale and part of the time for Mr. Cupp and was here all of the time and I gave him a commission as deputy sheriff in case that me and the other deputies were out of town, there would be an officer left in town.

* * * * *

Q. When did you commence to pay him [Shirley] twenty dollars per month?

A. Why, I commenced paying him twenty dollars a month as soon as he commenced handling the books altogether.

Q. When did he begin handling the books altogether?

A. Along last January, I believe.

REDIRECT EXAMINATION.

Q. Mr. Smith, at the time you appointed Mr. Shirley as under-sheriff and since that time, has it been necessary for him, or the party holding that office, to reside at the county seat?

A. It is.

RECROSS-EXAMINATION.

Q. It is true, is it not, Mr. Smith, that during the first year after Mr. Shirley came to town that he gave almost all of his time to the drug store or to other private business of his own?

A. He done considerable work for me—considerable riding.

Q. Tell what portion of his time he spent in your work during the ten months next after his coming to Grand?

A. I couldn't give any estimate of how much, but he went every time I asked him to go; he was always ready and I never paid any attention to the exact amount of time he put in; I couldn't tell how much time I put in.

Q. Will you swear positively that during the first six months after Mr. Shirley moved to Grand, he spent in actual work under you as much as an average of one day each week?

A. No; I couldn't swear that he did, and I wouldn't swear that I worked an average of a day each week.

It thus appears that at the date of the initiation of this contest the defendant had been living off the land embraced in his entry for a period of about twenty months. He seeks to have this absence excused solely on the ground that during said entire period he held the office of under-sheriff of the county wherein the land is situated, and that in order to perform the duties of the office it was necessary for him to reside at Grand, the county seat, a town about twenty-five miles distant from the land.

The Department has held that absences made necessary by official duties may be excused, provided such duties devolved upon the entryman subsequently to the making of the entry, and the establishment of residence upon the land, but it is not sufficient to show that the entryman held an office the duties of which had to be performed at some place other than the land embraced in his entry. It must appear that his absence was due to his official position or employment, and if this is not shown, the fact that he held such official position constitutes no sufficient excuse for his absence from his claim. It is material, therefore, to a proper disposition of this case to determine whether the defendant's absence from the land has been shown to have been due to his official position.

The population of Day County in 1900 was, as shown by the official report of the census office, but 2,173. Considering this fact in connection with the testimony of the sheriff to the effect that at all times during the defendant's absence from the land there were eight deputy sheriffs in the county, two of whom, together with the sheriff, were stationed at the county seat all the time and one a part of the time; and that he could not swear that the defendant, or even he himself (the sheriff), was engaged on an average of one day a week in the performance of official duties, it is clear that the duties incident to the office of under-sheriff and the prospective emoluments of the office were not such as would induce a man of ordinary industry and prudence to absent himself continuously from his homestead claim merely for the purpose of holding the office. Moreover, the testimony in the case shows that the office did not, as a matter of fact, form the real inducement for the defendant's absence from his claim; that his true purpose in removing to Grand was that he might engage in the drug business at that place, the acceptance and holding of the office being but a subterfuge employed by him for the purpose of escaping the consequences that would otherwise inevitably have resulted from proof of his failure to continue to reside on the land. An entryman's absence from his claim under such circumstances cannot properly be said to have been due to official employment; hence it must be held, in accordance with the views previously herein expressed, that the fact that the defendant held the office of under-sheriff does not constitute a sufficient excuse for his absence from the land embraced in his entry.

The defendant's long-continued absence from the land having been proved, and no sufficient excuse for such absence having been shown, the entry should be canceled on the ground of abandonment. It is accordingly so ordered.

The decision appealed from is therefore reversed.

GRINDBERG *v.* CAMPION.

Motion for review of departmental decision of September 17, 1904, 33 L. D., 248, denied by Secretary Hitchcock, November 15, 1904, and petition for rereview denied by Acting Secretary Ryan, July 19, 1905.

BOUNTY LAND WARRANT—LOCATION—SUBSTITUTION OF CASH.

WILLIAM R. BORDERS.

The location of a military bounty land warrant issued prior to the death of the warrantee, by one claiming through an assignment of the warrant from the widow of the warrantee, will not be confirmed in the absence of proof showing that the widow was the sole heir, or was authorized to assign the interests of the other heirs, if there were any.

The substitution of cash for a military bounty land warrant will not be permitted where the only obstacle to confirmation of the location under the warrant is the refusal of the locator or transferee to endeavor to procure the necessary proof to establish the validity of the location.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 19, 1905.* (E. F. B.)

With your letter of June 19, 1905, you transmit the papers in the appeal of William R. Borders from the decision of your office of June 5, 1905, refusing to accept a substitute in cash for military bounty land warrant No. 27606, issued in the name of John W. Brashear, with which a location was made May 7, 1852, at the Kaskaskia land office, Illinois, of the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, T. 5 S., R. 5 W., 3 P. M., which was afterwards canceled. You however reinstated said location for the purpose of allowing Borders to furnish evidence as to the validity of the assignment under which said location was made.

The papers submitted with your letter show that said warrant was assigned May 6, 1852, by Mary G. Brashear, the widow of the warrantee, to Francis M. Cross, who located it May 7, 1852, upon the land in question.

September 16, of that year, the entry was suspended, for the reason, chiefly, that no evidence had been furnished of the widow's right to assign the warrant, in this, that if the warrantee died after the issuance of the warrant, it belonged to the heirs, and if he died before its issuance, it should have been issued in the name of the widow. The warrant and papers were returned to the local office in order that the heir or heirs might be enabled to comply with the requirements of your office.

March 11, 1856, the attention of the local officers was called to the fact that no evidence of the right of the widow to assign the warrant had been furnished, and they were directed to cancel the location upon the plat, but to withhold the land from entry, for the benefit of the locator.

In 1862 a patent was applied for. In response thereto the Commissioner of the General Land Office, under date of April 2, 1862,

after recounting the fact as to the cancellation of the entry because of the defect in the assignment, said:

As the cancellation in this case was based upon a mere defect in the assignment of the warrant, and as the tract located is now vacant, I have this day ordered the return of the warrant by the register at Springfield with the view of reinstating the location, and of issuing a patent therefor to the locator, if the defect in the assignment alluded to is such as to admit of correction within a reasonable time.

As soon as the warrant is received from the register before mentioned, you will be further advised.

On the same day, the local officers were instructed to return the warrant to the General Land Office and to "reserve the tract above described, until otherwise directed, from sale or location."

So far as shown by the record, nothing further appears to have been done with reference to said entry until December 3, 1904, when Messrs. Harvey Spalding & Sons, attorneys for William R. Borders, the present owner through mesne conveyances of the right, title and interest of Cross under said location, applied to substitute cash for said warrant and asked that the entry be reinstated so that the tract will not appear on the books to be vacant land.

In passing upon this application, your office, by letter of June 5, 1905, held that the warrant can not be accepted in satisfaction of this location, under the assignment of the widow, unless it be shown that it was issued after the death of the warrantee or that there were no surviving heirs other than the widow; or, if there are any such heirs surviving, they must join in the assignment before its validity can be recognized.

You reinstated the entry for the purpose of allowing Borders to furnish the testimony indicated.

The warrant appears to have been legally issued and the land was subject to location with military bounty land warrants. It was issued in the name of the soldier, and the reasonable presumption is that it was issued during his life time. The only question is whether the assignment by the widow of Brashear to Cross, the locator, was sufficient to authorize the location in his name in the absence of proof that the widow was the sole heir, or was authorized to assign the interest of other heirs, if there were any.

Such evidence is required by the government, but it is for the purpose of protecting the heirs, if there be any. If it should waive the production of such proof, or should allow a location to be perfected upon insufficient evidence of the validity of the assignment, no liability to the heirs would be incurred by the government, but their remedy would be against the land, as the lawful issuance of a valid warrant, vesting in the warrantee the right to make location thereof, satisfied the claim of the soldier, and the obligation would not again be cast

upon the government by allowing a location of the claim to be made upon a defective or insufficient assignment. The purchaser must look to every part of the title which is essential to its validity. (*Brush v. Ware*, 15 Pet., 93.)

As the government is not free from fault in neglecting to take proper action upon the location for more than fifty years, and has silently acquiesced in the occupancy of the premises by the present owner and his grantors under said entry by withholding it from entry or other disposition, equity and justice would seem to require that his title should be quieted and that a patent should issue without further consideration.

But as he would also, for the same reason, be entitled to have entry upon which the patent issues free from the claim of any unknown heirs of Brashear, no valid reason can be perceived why he should not be allowed to substitute cash for the warrant, so that the patent issued thereon would issue solely to his benefit, free from other claim.

The entryman upon making such substitution would be entitled to whatever interest the widow of Brashear had in the warrant, but as that interest cannot be ascertained by the Department in the absence of proof of the same character as that required to establish the validity of the warrant location, the decision of your office, reinstating the entry and allowing Borders to furnish proof of the validity of the assignment of the entire interest in the warrant, is affirmed, with this condition, that if the applicant will make affidavit that he has endeavored to obtain such proof, stating the extent and character of his inquiry, and that it is not obtainable, you will then allow a substitute to be made of cash for the warrant, but you will not deliver the warrant except upon the application of all parties having any right, title or interest in it, and upon submission of satisfactory proof that they are heirs, or representatives of the heirs, of John W. Brashear living at the time of his death. The substitution of cash for the warrant should not be allowed until every effort has been made to procure the necessary proof required to show the validity of the assignment and it is evident that it cannot be obtained.

In the case of Robert M. Stitt (33 L. D., 315), cited by your office, it was said that an entryman will not be permitted to relinquish his entry, or allow it to be cancelled and withdraw his scrip, where the entry can be confirmed and where the only obstacle to confirmation is the arbitrary refusal of the entryman to supply the necessary proof. Upon the same principle, a substitution of cash for a warrant should not be allowed where the only obstacle to the confirmation of the location is the refusal of the locator or transferee to endeavor to procure the necessary proof to establish the validity of the location with the warrant.

Your decision, as thus modified, is affirmed.

MINING CLAIM—PATENT PROCEEDINGS—EQUITABLE ACTION.

ALASKA PLACER CLAIM.

Proceedings for patent to a mining claim embracing land lying partly within one land district and partly within another, conducted wholly within one land district, and the allowance of entry thereon covering the entire claim, are in no wise effective as to the lands lying without such land district, and do not constitute substantial compliance with law as to such lands, within the meaning of sections 2450 to 2457 of the Revised Statutes, such as would warrant confirmation of the entry in its entirety under said sections.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, July 10, 1905.* (G. N. B.)

July 13, 1904, you submitted, for approval by the Secretary of the Interior and the Attorney General under section 2451 of the Revised Statutes, your decision under section 2450 of the Revised Statutes, in the case of suspended mineral entry No. 1676, Montrose land district, Colorado, made October 3, 1901, by Edward Henry, for the Alaska placer claim, survey No. 15,416, accompanied by a letter, addressed to the Secretary of the Interior, explaining certain special features of the case which in your judgment call for equitable consideration under sections 2450 to 2457, inclusive, of the Revised Statutes.

The record shows that while a portion of the Alaska claim lies in the Durango land district, Colorado, entry embracing the entire claim was made in the Montrose district, and no proceedings whatever were had in the Durango district.

In your letter of explanation you say:

Notwithstanding the fact that notice of the application for patent in this case was not posted in the land office at Durango, Colorado, as required by law, I recommend the confirmation of said entry No. 1676, for the following reasons:

First.—A careful examination of the entire record convinces me that the application for patent, and the entry were allowed in good faith.

Second.—The failure to post copy of the notice of application for patent in this case, in the land office at Durango, Colorado, was not the fault of the claimant.

Third.—The question is one solely between the government and the claimant, as no adverse claim nor protest has been filed.

And lastly.—To cancel said entry and compel the claimant to commence proceedings for patent *de novo* would be a hardship, which in my judgment should not be imposed upon him.

Section 2457 of the Revised Statutes specifies the character of suspended entries which are to be decided by the Commissioner of the General Land Office "upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney General, and the Commissioner, conjointly," under section 2450, and submitted for approval under section 2451, as those "where the law has been sub-

stantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained."

You state, in substance, that this case does not come within any of the regulations adopted under section 2450 (General Circular, January 25, 1904, pp. 245-250), and for that reason you submit the same as a *special* case, not covered by the rules. (General Circular, p. 247.)

Under the facts disclosed by the record, the question first presented is, whether this is a case "where the law has been substantially complied with." If not, there is nothing to justify equitable consideration under the statute.

An application for patent under the mining laws is required to be filed "in the proper land office." (Sec. 2325, Revised Statutes.) This means that the application must be filed in the office of the land district where the land applied for is situated. The officers of a land district have no jurisdiction or control over lands outside the limits of their district. They cannot allow entry for land not within the district for which they are appointed. In other words, there is no authority of law for the officers of one land district to dispose of land lying in another district.

In this case the register and receiver of the Montrose land district undertook to entertain patent proceedings and to allow entry for a mining claim embracing land a portion of which is not within their district, but which lies in the adjoining Durango land district. The Department is of opinion that, with respect to the land in the Durango district, there is no authority of law for the action taken, and that, therefore, this is not a case "where the law has been substantially complied with," as to that portion of the claim. No application for patent was filed in the Durango office, no notice was posted in that office or on the claim in that district, and therefore no proof of notice was, or could have been, filed in that office. There was no lawful notice to adverse claimants, if any there were, as to the land in the Durango district. As to that part of the claim there has been no assumption under the statute "that the applicant is entitled to a patent" and "that no adverse claim exists," and there has been no opportunity for conflicting claimants, if any, to file adverse claims. In short, not only has there not been substantial compliance with the law, but there has been no compliance with law at all, in so far as the portion of the claim in the Durango district is concerned. This being true, it follows that the case is not one as to which equitable considerations under the statute may be applied. Therefore, your decision and recommendation cannot be accepted; and the record is returned to your office for further consideration, and for such action in the premises as the facts and the law may justify.

The Department knows of no reason why the entry may not be allowed to stand as to that portion of the claim which lies in the

Montrose land district, should the claimant so elect, provided the patent proceedings in that district have been regular, and the law fully complied with. Or, should the claimant prefer, he may be allowed, under additional patent proceedings in the Durango district, to be conducted in all respects in conformity to law, to make supplemental entry for the portion of the claim in that district, and thus obtain patent for the entire claim. In that event, the proof of expenditure in labor and improvements on the claim, which accompanied the proceedings in the Montrose district, if found sufficient and regular, should be accepted in the proceedings in the Durango district.

MINING CLAIM—PLACER LOCATION—CONFORMITY TO SYSTEM OF PUBLIC LAND SURVEYS.

HOGAN AND IDAHO PLACER MINING CLAIMS.

The fact that a placer mining location, if made to conform as nearly as practicable to the *system* of public-land surveys and the rectangular subdivisions of such surveys, as required by section 2331 of the Revised Statutes, would embrace small portions of land not valuable for placer mining, constitutes no reason for failure to conform the location to such system and legal subdivisions, where, if so conformed, the land embraced in the location would be as a whole more valuable for placer mining than for agricultural purposes.

It is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 19, 1905.* (A. B. P.)

September 11, 1903, the Crooked River Mining and Milling Company made entry for the Hogan and Idaho placer claims and eight lode claims known as the Orion, the Pineapple, the Buffalo Queen, the Little Fritz Fraction, the Alaska No. 3, the Alaska No. 4, the Friday, and the Friday Fraction, all included in survey No. 1834, Lewiston, Idaho.

June 7, 1904, your office directed the local officers to notify the company that it would be allowed sixty days within which to show cause why the placer claims should not be made to conform to the United States system of public-land surveys, and stated that on failure to make such showing, or to appeal, the entry, to the extent of the placer claims, would be canceled without further notice.

The company has appealed to the Department.

Placer mining claims located after May 10, 1872, are required by law to conform as nearly as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such

surveys; and this is true whether the claims be located upon surveyed or unsurveyed lands. (Revised Statutes, sec. 2331; Miller Placer Claim, 30 L. D., 225, 227; Wood Placer Mining Company, 32 L. D., 198, 199—on review, Id., 363.)

The Hogan and Idaho claims were located in 1902 upon unsurveyed lands, and were surveyed for patent February 5-11, 1903. They are very irregular in form, vary in width from about 200 feet to about 1,200 feet, adjoin each other end on end, and are so located as to embrace within their lines the Crooked River for a distance of about three and one-half miles. They do not even approximate conformity with the *system* of the public-land surveys, but are wholly at variance with such system, which, as was said in the case of Miller Placer Claim, *supra*, "affords no warrant for cutting the public lands into lengthy strips of such narrow width."

In the company's appeal it is stated, in substance and effect, that the lands adjacent to the placer claims are not valuable for placer mining, but contain, and in part have been located for, veins or lodes of gold and silver; and for these reasons it is contended that the placer locations could not be conformed to the system of public-land surveys. There is nothing in the record to show the conditions to be as thus stated, but even if there were, the company would be in no better situation, and its contention could not be sustained.

In the first place, assuming that the land embraced in the Hogan and Idaho locations are of sufficient placer value to be patentable under the placer law, and that the adjacent lands are non-placer in character, as stated, a rearrangement of the lines of the locations to meet the requirements of the law in respect to conformity to the *system* of public-land surveys, considering that tracts as small as ten acres in area, in square form, are recognized as legal subdivisions under the mining laws (sec. 2330, Revised Statutes), would not necessitate the inclusion of the adjacent non-placer lands to such an extent as to affect the validity of the locations on that account. It not infrequently occurs that tracts of land small portions of which are not valuable for placer mining are embraced within placer locations where the lands as a whole are in fact more valuable for placer mining than for agricultural purposes. There is, therefore, nothing in this phase of the company's contention.

The other phase of the contention is equally untenable. It is a well recognized fact that both classes of mineral deposits—that is, veins or lodes, and placer deposits—are frequently found to exist in the same land, and it is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits.

It is usually a simple matter, in locating placer claims, even upon unsurveyed lands, to conform the locations to the *system* of public-land surveys. The law's requirement in this respect as to unsurveyed

lands is met by locating the claims in rectangular form with proper dimensions and with east and west and north and south lines. (Wood Placer Mining Company, 32 L. D., 363, 365.)

It is also asserted in the company's appeal that the Hogan and Idaho claims are "strictly gulch placers." This assertion is followed by the statement, apparently made to support it, that the land rises from Crooked River at slopes of from twenty to thirty degrees. Even if this be true, it needs no argument to show that lands ascending at slopes of twenty to thirty degrees only, are not thereby rendered impracticable of location under the placer mining laws. Upon the company's own showing, therefore, the claims cannot be regarded as in any sense within the category of "gulch placers."

It follows from what has been said that the entry in question, to the extent of the placer claims, is unlawful and must be canceled; and your office decision, in effect holding the entry for cancellation to such extent, is affirmed. This will leave the lode claims embraced in the entry in noncontiguous tracts or bodies, a fact necessary to be considered in the re-adjudication of the case.

MINING CLAIM-PLACER LOCATION-LEGAL SUBDIVISIONS.

RIALTO No. 2 PLACER MINING CLAIM.

A location under the mining laws does not of itself amount to an appropriation of land in such a sense as to preclude the inclusion of the same, or parts thereof, within the limits of a subsequent location, subject to such existing rights as may be thereafter maintained under the prior location; and the fact that a placer location, if made to conform to legal subdivisions of the public surveys, would embrace all or a portion of the land covered by a prior location, is not a sufficient reason for failure to conform the placer location to legal subdivisions, as required by section 2331 of the Revised Statutes.

The fact that portions of other claims already entered may be embraced in a placer location by conforming the same to legal subdivisions, does not make such conformity impracticable, within the meaning of section 2331 of the Revised Statutes, inasmuch as under the law such entered claims may be excluded from patent proceedings involving the placer.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 19, 1905.* (A. B. P.)

July 7, 1902, Julius Nelson was permitted to make entry for the Rialto No. 2 Placer Mining Claim, survey No. 15,653, Leadville, Colorado, situated upon surveyed lands, in Sec. 21, T. 9 S., R. 78 W., 6th P. M. September 12, 1903, your office directed the local officers to allow the claimant sixty days from notice within which to show cause why his entry should not be canceled for the reason that the

claim does not conform to the legal subdivisions of the public lands, as required by sections 2330 and 2331 of the Revised Statutes.

November 3, 1903, the claimant, in response to notice from the local officers, filed his corroborated affidavit, wherein he states, in substance and effect, that at the time the claim was located it was surrounded by "valid lode and placer claims;" that all the public lands so surrounded were embraced in the location; that "it would have been impossible to have conformed any more nearly to the lines of the legal subdivisions without embracing non-contiguous tracts;" that, as surveyed and entered, the west line of the claim is the section line between sections 20 and 21, and at other places where possible the section lines have been followed; and that the irregular lines on the north, the east, and the southeast were so run "to exclude the valid existing claims lying along those sides," as shown by a diagram attached to and made a part of the affidavit.

By decision of December 28, 1903, your office held, in effect, that a mineral location is not, of itself, such an appropriation of the land included in it as to prevent the inclusion of the same land in another location, and, therefore, that the evidence submitted is insufficient to show that the claim here in question could not have been located and entered in accordance with the legal subdivisions of the public lands; and Nelson's entry was held for cancellation. He thereupon appealed to the Department.

Upon the official plat of the survey of the claim, approved April 5, 1902, several adjoining surveyed claims are protracted. It is upon the unofficial diagram attached to claimant's affidavit, however, that the conditions stated and relied on by him are made more fully to appear. The diagram and official plat agree as far as the latter goes, except that the claims protracted on the plat are designated on the diagram as entered claims, while not so designated on the plat.

Under the law (Sec. 2331 of the Revised Statutes) placer claims located after May 10, 1872, are required to "conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys;" and it is only when such claims "cannot be conformed to legal subdivisions" that entry thereof may be made otherwise than in accordance with legal subdivisions. The claim here in question was located long after 1872.

The appellant raises no question as to the law, but contends that his claim is one which "cannot be conformed to legal subdivisions," because of prior mineral locations surrounding it, as represented in part on the official plat, and more fully on the said diagram.

The Department is not favorably impressed by this contention. The surrounding prior locations, in so far as unentered, even if their existence and validity were admitted, as alleged, could not, and did not, of themselves, amount to appropriations of the lands embraced

in them in such a sense as to preclude the inclusion of such lands, or parts thereof, within the limits of the Rialto No. 2 location, subject to such rights as then existed and were afterwards maintained under such prior locations. Their existence, therefore, if such were the fact, would not prove that the Rialto No. 2 claim could not have been conformed to the legal subdivisions of the public survey. Such prior locations, of themselves, could not and did not have the effect to separate the lands into non-contiguous tracts, as contended, within the meaning of the term *non-contiguous* as understood and used in connection with the administration of the public land laws.

If it be true that some of the surrounding claims were entered prior to the Rialto No. 2 location, as would appear to be the case from the diagram referred to, that fact could not have made it impracticable, in locating the Rialto No. 2 placer, to describe it by legal subdivisions. Under the settled law and practice, such entered claims could and must have been excluded from patent proceedings involving the placer. (Mary Darling Placer Claim, 31 L. D., 64.)

The conclusion reached by your office is accordingly affirmed, but without prejudice to the right of appellant to begin patent proceedings anew, provided he shall amend his location to conform to legal subdivisions as required by law.

HOMESTEAD—HEIRS—CULTIVATION—FINAL PROOF—ALIENATION.

PROSSER *v.* HEIRS OF GILLEY.

The heirs of a deceased homestead entryman may delegate to another the power to perform for their benefit the cultivation on the entry required by law, and such cultivation, if actually carried on in good faith for the required period, constitutes compliance with the homestead law the same as though performed by the heirs themselves.

The right conferred by law upon the heirs of a deceased homestead entryman to submit final proof on the entry can not be delegated to another.

Where a homestead claimant, by contract to convey the land embraced in his entry after the submission of final proof, puts it beyond his power to acquire title under the entry except by perjury, he thereby forfeits his rights, and upon proof of such fact the entry will be canceled.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 19, 1905.* (E. O. P.)

The Department has before it the appeal of C. W. Prosser from your office decision of December 4, 1904, reversing that of the local officers and dismissing his contest against the homestead entry of William T. Gilley, deceased, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, T. 28 N., R. 1 W., Guthrie land district, Oklahoma.

The basis of the contest is the alleged alienation, by the heirs, of the land covered by the entry, and in support thereof contestant

offered in evidence certain powers of attorney executed on behalf of said heirs, to one Ed. L. Peckham. Said powers of attorney are, in all essential particulars, the same, except as to the amounts named therein to be paid to the different parties executing them, in full for their interest in the land. As it is upon the construction of the said instruments that the decision of the Department herein must necessarily rest, and as they are similar, only the joint power executed by Frank Gilley and J. L. McLearen, is set out herein, as follows:

Know all men by these presents, That we, Frank M. Gilley and J. L. McLearen, heirs at law of William Gilley, deceased, do hereby make, constitute and appoint Ed L. Peckham, Attorney at Law, of Blackwell, Oklahoma, our true, sufficient and lawful attorney, for us and in our name, to make final proof of the South half of the South-West Quarter ($\frac{1}{4}$) in Section Twenty-Two (22), in Township Twenty-Eight (28), North of Range one (1) West of the Indian Meridian, in Kay County, Oklahoma Territory; and for such purpose to take entire charge of the same and to borrow the funds with which to pay for said land to the government of the United States and all expenses of making such proof. And when so proven up, to sell our interests in said land to whatever person or persons said Peckham thinks best, and to make and execute a deed of conveyance therefor. Said Peckham to retain for his services herein all he may receive for our interests in said land over the sum of one hundred and twenty-five dollars (\$125.00) and to do and perform all necessary acts in the execution of the aforesaid business in as full and ample a manner as we might do if we were personally present. Hereby making this power of attorney irrevocable, and hereby ratifying and confirming all that our said attorney shall do by virtue hereof.

In witness whereof, we have hereunto set our hands this 19th day of April, A. D., 1898.

FRANK M. GILLEY
J. L. MCLEAREN

The instrument was duly acknowledged.

There is also with the record the joint receipt of said Gilley and McLearen, bearing the same date as the power of attorney executed by them, for the amount named therein as due for their interest in the land. Similar receipts were executed by each of the other heirs, bearing the same date as the powers of attorney executed by them, except in case of James Gilley, whose receipt bears no date.

In the decision appealed from your office denied the validity of said instruments and held them to be without force and effect for any purpose—

other than perhaps as evidence of the immaterial fact that the heirs did, prior to proof, have an intent to make the proof for the purpose of selling and disposing of the land after the issuance of final certificate—

for the reason that the power attempted to be conferred upon the attorney-in-fact to make final proof was void. While it is not to be denied that the power to submit final proof cannot be delegated, yet unless it is clear that such was the plain intent of the instrument, such effect should not be given thereto, as all rules of construction require

that, if possible, the language used should be so construed as to give legal effect to the instrument.

The widow, heirs or devisees of a deceased entryman are not required to continue the actual residence necessary on the part of the original entryman, but may either reside upon or cultivate the land for the required period. It has also been repeatedly held that cultivation of the land by another inures to the benefit of the heirs, and such acts need not be performed in person. Following this rule, it is clear that the heirs may delegate the power to perform the required services for their benefit, and such cultivation and improvement, if actually carried on in good faith for the required period, constitutes compliance with the homestead law. The law casting the right initiated by the original claimant upon his widow, heirs or devisees, intended to confer upon them all the advantages and benefits which would have accrued to their deceased ancestor or deviser, and the Department in construing it has uniformly sought to fully protect the right in the hands of the beneficiaries without restricting its enjoyment by imposing conditions not warranted by a liberal construction of the statute. Personal residence or cultivation by the heirs might greatly limit or entirely defeat the benefit conferred, and for that reason such requirement has never been enforced as against them. In the case at bar it was necessary that cultivation be maintained after the death of William T. Gilley, the entryman, and it appears that the heirs were residents of distant states. Under these circumstances, it was not only reasonable, but highly probable, the heirs, in conferring upon their attorney-in-fact the power to make final proof, only attempted to delegate a legal power, namely, the power to perform, or secure performance of, the necessary acts of cultivation required of them in lieu of residence. The ministerial act of submitting final proof could not be delegated, and as the language conferring the power will admit of two constructions, one legal and the other void, the former will be adopted as the one intended by the parties.

This construction of the language conferring the power to make final proof leaves for consideration the effect of the granting of the power to sell the land after final proof. It is not to be denied that the heirs might, after acquiring title to the land, deal with it as they deemed best, but any attempted conveyance or contract to convey, executed prior thereto, will, when shown, defeat the right to complete the entry. The beneficiaries named take the right initiated by the deceased subject to all the conditions imposed by section 2291, Revised Statutes. By this section they are required, on making final proof, to take oath "that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight." While actual alienation of the land is impossible prior to submission of

final proof, yet the Department has held that any attempted alienation, which but for the inhibition of the law would have been effectual, is such a violation of the statute as warrants a cancellation of the entry. No other construction can be adopted and give effect to the language used. In the case of *Anderson v. Carkins* (135 U. S., 483, 487), the entryman made no attempted actual conveyance of the land. His only act of alienation was a contract to convey after the submission of final proof. The court held that such a contract, though incapable of enforcement in a court of equity, would prevent the homestead right being perfected "without perjury by the homesteader." The departmental decisions now in force governing such cases hold that where a claimant has put it beyond his power to acquire title except by perjury, he has forfeited his rights. The power to sell, conferred by this instrument under consideration, coupled with the agreement therein contained as to the amount to be paid for the interests of the different heirs, acting as principals, clearly constitutes a contract to convey the land and places the present claimants under the ban of the statute. Not only was the price to be paid definitely fixed, but, as appears from the receipts introduced in evidence, the stipulated amounts were actually paid to the different heirs at the time said powers of attorney were given.

Though fraud in obtaining the said powers of attorney was alleged as a defense, no evidence was introduced by the defendants to sustain the allegation, and while the facts set forth in your said decision might be sufficient to raise a presumption of imposition upon the heirs or question the honesty of the transaction, yet it is a universal rule that fraud, when relied upon as a defense, must be strictly proved. The Department cannot abrogate the rule and entertain a bare presumption or accept an unsupported allegation of fraud, to controvert the record facts before it.

For the reasons herein stated your said decision is hereby reversed. The entry in question will be canceled.

COAL LAND—AFFIDAVIT—PARAGRAPH 32 OF COAL LAND REGULATIONS.

W. D. KEEN.

The affidavit prescribed by paragraph 32 of the coal-land regulations must be made by the claimant himself.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 20, 1905.* (F. H. B.)

March 14, 1902, W. D. Keen filed in the local office at Santa Fe, New Mexico, his coal declaratory statement, covering the SW. $\frac{1}{4}$ of Sec. 32, T. 14 N., R. 6 E., N. M. P. M.

May 4, 1903, application was made to purchase the tract, and was accompanied by the necessary proofs, except that in lieu of the affidavit required by paragraph 32 of the coal-land regulations, approved July 31, 1882, to be made by the claimant (otherwise than so far as it refers to the character of the land): there was submitted the affidavit of Willard S. Hopewell, as attorney in fact for Keen. The purchase price was paid, and final certificate of entry issued June 26, 1903.

In due course, your office, by decision of September 21, 1903, held the affidavit of the attorney in fact to be insufficient; and directed the local officers to call upon the entryman to submit his personal affidavit substantially in the form set forth in paragraph 32 of the coal-land regulations, except as to the character of the land, unless personally acquainted therewith. Motion for review was denied December 2, 1903; and the pending appeal was thereupon taken.

A petition has since been filed here, in which it is prayed that, should the Department feel unauthorized to direct that the entry be passed to patent, steps be taken for the submission of the case to the Board of Equitable Adjudication for consideration and action. Accompanying the petition is an affidavit by the attorney in fact, in which it is alleged, among other things, in substance, that affiant made the final affidavit submitted at the time of purchase, believing himself authorized, as the claimant's attorney in fact, so to do; that at that time affiant was informed and believed, and that he now understands, that the claimant had not had the benefits of the coal-land laws, or held or purchased, as an individual or as a member of an association, any coal lands under those laws; that since called upon by your office decision of September 21, 1903, to furnish the affidavit of the claimant affiant has made diligent effort so to do, but has been unable to procure such affidavit, the present whereabouts of the claimant being unknown to affiant; and that affiant believes it will be impossible for him to procure the claimant's affidavit. It is urged, to support the petition, that the entry is within the class contemplated by section 2457, Revised Statutes, and entitled to equitable consideration, and may be submitted under the provision of the regulation of April 25, 1877 (General Circular, issued January 25, 1904, p. 247), for the submission of special cases not covered by the general rules: that the local officers permitted the attorney in fact to file the affidavit to which objection is made, accepted the purchase price, and allowed entry; that the affidavit prescribed by paragraph 32 of the coal-land regulations does not embody a statutory requirement; that when claimant filed his declaratory statement he personally made oath substantially to all the essential averments set forth in the affidavit prescribed by the regulations; and that there is no adverse claim to the land and no right in another to be prejudiced.

Answering first the appeal, it may be said that the Department has expressly recognized and reaffirmed, in the case of Elwood R. Stafford *et al.* (21 L. D., 300), which was cited by your office, the requirement, under paragraph 32 of the regulations, that the affidavit thereby prescribed must be made by the claimant himself, although the case went off on another point. In respect of several of its features the affidavit is one which could not be made by another with certainty of its truth. Nor is the requirement in this behalf answered by the fact that the claimant personally made oath to his declaratory statement, for the latter does not in fact contain all the essential averments of the affidavit prescribed by paragraph 32; and even were it otherwise, the allegations contained in the declaratory statement could not relate to and cover the ensuing interval to the date of entry. The Department would not, therefore, be warranted in reversing the decision of your office and directing that the entry be allowed to pass to patent.

It is a sufficient answer to the petition to say that the relief thereby sought could be secured by the claimant's own act, viz., by the submission of his personal affidavit as prescribed by the regulations, if no other objection were to appear. The fact that the claimant himself can not be found and that the petition is really preferred by the attorney in fact, can not be taken into account: the latter can be recognized only in his representative capacity. There is nothing in the case to entitle it to equitable consideration, and the prayer of the petition must be denied.

The decision of your office is affirmed, and the entry will be canceled.

HOMESTEAD ENTRY—ALIEN HEIRS.

MAJOR *v.* HEIRS OF HARTNETT.

A homestead entryman who at the time of his death had not acquired the legal title to the land embraced in his entry, was not at such time, by reason of his claim under the entry, a person "holding real property," within the meaning of article 1 of the treaty of March 2, 1899, between the United States and Great Britain, and his alien heirs, subjects of the latter country, have therefore no such claim or right to the lands embraced in the entry as is entitled to protection under the provisions of said treaty.

There is no provision of the homestead law by which any rights or claims to public lands, prior to the issuance of patent, can be devised or succeeded to and perfected by, or on behalf of, other than citizens of the United States.

Acting Secretary Ryan to the Commisisoner of the General Land
(F. L. C.) *Office, July 24, 1905.* (P. E. W.)

August 28, 1894, Patrick Hartnett made homestead entry, No. 5887, for the SE. $\frac{1}{4}$, Sec. 35, T. 22 N., R. 14 W., Alva, Oklahoma, and on May 1, 1901, he submitted final proof therefor, on which final certificate No. 2859 issued on August 22, 1901. August 14, 1902, John C.

Major filed protest against the issuance of patent for said land on the ground that said Hartnett died on October 14, 1901, leaving no wife and no heirs, native born or naturalized, capable of inheriting the said homestead and that Hartnett was not himself a naturalized citizen of the United States, never having taken out his final papers.

After service by publication had been had in due form, a hearing was had on July 14, 1903, upon which the local officers found that the entryman had died and left no heirs, and recommended cancellation of the entry.

February 12, 1904, they transmitted the record to your office and reported no appeal.

November 23, 1904, your office held their findings of fact final, concurred in their conclusions of law and held the entry for cancellation.

In connection with this case, your office in said decision considered the contest affidavit of Earl R. Stults, filed February 27, 1904, against the same entry, in which charges similar to the foregoing were made against Hartnett, and it is further alleged that Major is disqualified as contestant against said entry by the fact that he is, and has since December 18, 1901, been, the administrator of the estate of said Hartnett. Thereupon your office held that the right to contest an entry does not depend on the right to enter the land, and that in consideration of the circumstances disclosed by the record in the case brought by Major, he is not disqualified to bring contest. Stults's affidavit of contest was rejected and he has appealed to the Department, contending that it was error to reject his contest and error not to dismiss Major's contest.

Prior to your said decision there was also filed in your office, on November 3, 1904—

objections to the contest of John C. Major, at the request of James Hartnett, one of the brothers and heirs at law of Patrick Hartnett, deceased, and at the request of His Majesty's Consul, Alexander Finn, under the treaty existing between Great Britain and the United States, proclaimed August 6th, 1900.

Subsequently to your said decision, on January 14, 1905, resident counsel, as "Attorney for the heirs-at-law of Patrick Hartnett, deceased, and acting for Hon. Alex. Finn, His Majesty's consul, near Oklahoma Territory, representing the foreign-born heirs of said Patrick Hartnett," filed his motion that your said office decision—

be vacated and set aside, and that said entry be submitted to the Board of Equitable Adjudication, under Rule 31.

In support of this motion it is contended: (1) that at the date of final entry, August 22, 1901, there were no adverse claims of record; (2) that where certain legal requirements appear not to have been met because of the neglect or inattention of the local officers the entry may go to said Board; (3) that claimant and his witnesses swore that he was a naturalized citizen at that date; (4) that Hartnett may

have taken out his final papers in Kingfisher County, Oklahoma, where the records were burned in August 1900, or may have taken out such papers in an adjoining State; (5) that Hartnett placed valuable improvements on said tract, made the same his home for more than six years and cultivated sixty acres for six seasons is an unusually good showing; and (6) that the heirs of the deceased homestead claimant are entitled to consideration and their rights in this matter should be carefully guarded. This motion and the said objections are not supported by any showing of facts.

With the record is a joint affidavit, executed by John Hartnett, James Hartnett and Anne Kiely, all born and still residing in Ireland, in which they state, under date of May 6, 1903, that they are the surviving brothers and sister of the said Patrick Hartnett, their two other brothers, Maurice and Thomas, being dead; and that excepting said Patrick, Maurice and Thomas, no other brother or sister of affiants ever went to America. Also a certified copy of another affidavit by the same parties, dated September 28, 1903, and filed in the office of the probate judge of Woods County, Oklahoma Territory, in the matter of the estate of said Patrick Hartnett, stating that the affiants are his sole surviving heirs. It is not claimed or shown that other heirs exist.

Article 1 of said treaty (31 Stat., 1939) provides that—

Where on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.

Article 3 provides in effect that in case of the death of a British subject in the United States without having any known heirs in this country or testamentary executors by him appointed, the nearest British consular officer shall at once be notified so that the necessary information may be forwarded to all persons interested; and that such consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented.

In the case of *Patten v. Katz*, on review (26 L. D., 317), the Department said, with reference to a like provision in a treaty with another country:

Prerequisite to an appropriation of the privilege conferred, there must have died a person "holding real property." "Holding," relating to ownership in property, embraces two ideas: actual possession of some subject of property, and being invested with the legal title.

The terms of the said treaty do not apply to the case before us. Hartnett had not obtained, and was not holding, the legal title to the land involved. It is only by and upon the issuance of patent, that the government parts with the title to the public lands.

There is no provision of the homestead laws by which any rights or claims to land before patent can be devised or succeeded to and perfected by, or on behalf of, other than citizens of the United States. The application on behalf of Hartnett's heirs is accordingly dismissed.

The contention of appellant Stults is without merit and his appeal is dismissed, your said decision being hereby in all respects affirmed.

OKLAHOMA LANDS—SCHOOL SECTIONS—MINING LAWS.

GYPSITE PLACER MINING CLAIM.

Sections sixteen, thirty-six, thirteen and thirty-three of the lands ceded by the Comanche, Kiowa and Apache Indians under agreement ratified by the act of June 6, 1900, reserved for school and other purposes, are not subject to the operation of the mining laws.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 25, 1905.* (A. B. P.)

October 24, 1903, L. G. Hamilton, Sam Lazarus and Leo Jacobs offered for filing their application for patent to the Gypsite placer mining claim, embracing lands in sections 13 and 24 of T. 6 N., R. 10 W., El Reno, Oklahoma. November 5, 1903, the local officers rejected the application as to the lands in section 13 on the stated ground that section 13 is one of the specified sections of each township reserved to the Territory and future State of Oklahoma, for school and other purposes, by the act of June 6, 1900 (31 Stat., 672, 676-680), and are not subject to the United States mining laws as extended by that act. On appeal by the applicants, your office, by decision of May 9, 1903, affirmed the action below. The applicants have further appealed here.

By the act of June 6, 1900, the agreement whereby the lands of the Comanche, Kiowa, and Apache tribes of Indians were ceded to the United States was ratified and confirmed. Among other things, the agreement provided that out of the ceded lands allotments should be made to the Indians, and that there should be set aside by the Secretary of the Interior, for the use in common of the several tribes of Indians, four hundred and eighty thousand acres of grazing lands. The act ratifying the agreement, among other things, provides:

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and

be disposed of under the general provisions of the homestead and town-site laws of the United States:

That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved; sections sixteen and thirty-six, for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotments under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

* * * * *

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

Numerous errors are assigned in the appeal but it is unnecessary to set them out here in detail. They present, though in various forms, but one proposition, namely: that the lands in question are within the category of lands subject to the operation of the mining laws, and, consequently, your office decision is wrong and should be reversed.

This question has been heretofore considered and passed upon by the Department, by decision of April 9, 1903 (32 L. D., 95). There the question involved lands ceded to the United States by the Wichita and affiliated bands of Indians, under an agreement ratified by act of Congress of March 2, 1895 (28 Stat., 876, 894-899), as well as lands ceded by the Comanche, Kiowa, and Apache tribes, under the agreement above referred to. The provision of the act ratifying the Wichita agreement, relative to the extension of the mining laws to lands ceded by that agreement, was as follows:

That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement.

In passing upon the question, the Department, among other things, said (pp. 96-97):

By the act ratifying the Wichita agreement the mining laws of the United States were expressly extended over *the lands ceded* by that agreement. There would seem to be no room for serious question, therefore, that by that act sections 16 and 36, 13 and 33, reserved therein for school and other purposes, were made subject to the operation of the mining laws in the same manner and with like effect as are sections of land similarly reserved elsewhere, and not yet granted, as to which the mining laws are applicable.

With respect to the act ratifying the Comanche, Kiowa, and Apache agreement the situation is different. By that act only the lands which were to be allotted to the Indians or to be opened to settlement thereunder (Acme Cement and Plaster Co., 31 L. D., 125; Instructions, id., 154) were made subject to the mining laws and to mineral exploration and entry. The act did not extend the mining laws generally to the lands ceded by that agreement, as was done by the

earlier act with respect to the lands ceded by the Wichita agreement, but only to the lands which were to be allotted to the Indians or to be opened to settlement under the act. Sections 16 and 36, 13 and 33, reserved for school and other purposes for the benefit of the Territory and future State of Oklahoma, were not lands to be allotted to Indians or to be opened to settlement any more than were the four hundred and eighty thousand acres set aside for the common use of the Indians as grazing lands.

The Department is of the opinion that sections 16 and 36, 13 and 33, of the lands ceded by the Wichita agreement are subject to the operation of the mining laws, and that the like numbered sections of the lands ceded by the Comanche, Kiowa, and Apache agreement are not subject to the operation of such laws.

* * * * *

It is not intended to hold or to intimate that the Territory of Oklahoma is entitled, or that said Territory or the future State of Oklahoma may in any event be entitled, to minerals, if any, now known to exist in sections 16 and 36, 13 and 33, of the lands ceded by the last-mentioned agreement, or which may be hereafter found to exist in said sections, prior to the time when the same shall be granted to such Territory or State. It is simply held, as to said sections, that under existing legislation the lands therein are not subject to the operation of the mining laws.

The conclusion thus reached was followed in the case of *Oklahoma v. L. G. Hamilton* (unreported), decided April 6, 1904; and after carefully considering the various phases of the question as now again presented, the Department sees no reason to disturb its former ruling.

The decision appealed from is accordingly affirmed.

MINING CLAIM—PLACER LOCATION—CONFORMITY—JUDICIAL PROCEEDINGS.

LAUGHING WATER PLACER.

The mining laws contemplate that in all cases, except in instances where impracticable so to do, placer mining locations must be made in conformity with the system of public-land surveys, that is, rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines.

The only judicial proceedings in which a claim may become involved, resulting in delay which would otherwise be fatal to entry, and which will protect the rights of the applicant for patent during their pendency, are those arising under the mining laws themselves, whereby the applicant is prevented from completing his patent proceedings prior to final determination of the litigation.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 27, 1905.* (G. N. B.)

March 19, 1902, the Harney Peak Tin Mining, Milling and Manufacturing Company, by Albert R. Ledoux, receiver, made entry for the Laughing Water placer mining claim, survey No. 807, Rapid City, South Dakota, land district.

August 11, 1903, your office directed the local officers to notify the claimant that it would be allowed sixty days within which to show cause why the entry should not be canceled because, among other things not necessary to be here considered, (1) there had been a delay of over nine years in perfecting entry under the application, filed December 30, 1892, and (2) the claim as located does not conform as near as practicable to the United States system of public-land surveys and the rectangular subdivisions of such surveys. It was stated that on failure to make the required showing and in the absence of appeal the entry would be canceled without further notice.

In response to the foregoing, and on October 25, 1903, a number of affidavits were filed by the claimant, in which, taken together, it is alleged, among other things, in substance and effect, that the receiver, who was appointed in 1894, was unable to make entry earlier because of inability to procure money to pay for the land; that it is impracticable to conform the claim to the system of the public-land surveys and the rectangular subdivisions of such surveys because of adjoining valid and subsisting lode and placer mining claims; that where this is not the case only land valuable for its placer deposits is embraced in the claim; and that the location consists with a general practice in vogue in the mining district in which it is situated.

December 9, 1903, your office held the showing with respect to the non-conformity of the claim to be insufficient. The entry was held for cancellation accordingly, but, with reference to the delay in making entry under the application, it was stated that under all the circumstances of the case the objection on that score would be removed.

The applicant has appealed to the Department.

It is shown by the record that the placer claim was located by eight persons, July 1, 1886, and that, among other incidents, the present claimant, as successor in interest, made an amended location December 31, 1891, with which the pending entry coincides.

The township in which the claim is situated was surveyed in October, 1898, and the plat of survey was filed in the local office April 10, 1900.

By the official plat the claim is shown to pursue a zig-zag course and to trend generally north and south, its entire length being more than one and one-half miles. It varies in width from what would appear to be about 250 to about 600 feet, is bounded by twenty-nine courses, and embraces 54.11 acres. Laughing Water Creek, from which the claim evidently takes its name, flows almost entirely throughout the claim from end to end. No attempt was made even to approximate the location, or any portion of it, to the system of the public-land surveys, either in form or position.

It is contended by the appellant that the claim was located upon faith of the uniform practice of the land department, prior to departmental decision of August 15, 1900 (Miller Placer Claim, 30 L. D., 225), to pass to patent placer mining claims located on unsurveyed land without regard to their form and position. While the Department recognizes the fact to be that, in the past, under the more or less general practice of your office, claims on unsurveyed lands were permitted to pass to patent without regard to their form; no case is cited by counsel, and a most diligent search has failed to discover a decision by the Department, which directly authorizes such indiscriminate locations. The decisions cited by counsel to justify this location are without application, as the locations there under consideration were of a wholly different class and character. Even were it not a question of statutory requirement, the frequently fantastic outlines of numbers of placer locations which have of late years come to the attention of the Department would manifest the unwisdom of the recognition formerly accorded such non-conforming claims. With the gradual diminution of the public domain this question presents itself as one of increasing importance, and the illegality of locations of such elongated, narrow character as that here in question, often following the course of and embracing streams of water which the claimants seek to control, is made the more apparent. This claim, situate in the Black Hills region, lies along a valley enclosed by hills of moderate inclination, broken on either side by frequent draws and flats. The topography of the adjacent ground is not such as to have made it impracticable to define the location in conformity with the system of the public land surveys, that is, rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines. Such conformity the statute contemplates and the Department must require. (Wood Placer Mining Co., on review, 32 L. D., 363.)

It is urged by claimant that it is impracticable now to reform the location because of surrounding valid and subsisting lode and placer claims. Assuming the conditions to be as alleged (for the official plat does not indicate the claim to be so surrounded), interference with unentered claims affords no justification for non-conformity of location. This is discussed in the recent case of Rialto No. 2 Placer, decided July 19, 1905 (34 L. D., 44), dealing with a placer location upon surveyed land but upon this point controlling here, in which it is said:

The surrounding prior locations, in so far as unentered, even if their existence and validity were admitted, as alleged, could not, and did not, of themselves, amount to appropriations of the lands embraced in them in such a sense as to preclude the inclusion of such lands or parts thereof within the limits of the

Rialto No. 2 location, subject to such rights as then existed and were afterwards maintained under such prior locations. Their existence, therefore, if such were the fact, would not prove that the Rialto No. 2 claim could not have been conformed to the legal subdivisions of the public survey. Such prior locations, of themselves, could not and did not have the effect to separate the lands into non-contiguous tracts, as contended, within the meaning of the term non-contiguous as understood and used in connection with the administration of the public land laws.

It is contended that the Miller decision, *supra*, was, in effect, a new construction of the law, which should not be applied retroactively. Upon this point it may be said that had the Department previously construed the law to contemplate such a location as that here in question the contention might be of force. The Department's apparent acquiescence in what seems to have been a more or less common practice, however misleading it may have been in its results, can not be given the weight of direct authority, and is to be accounted for by the prominence of other and decisive questions presented in such cases as have been brought here. It is not clear how an interpretation of a law is to be given except the question is practically presented in a case. Whilst fully appreciating the situation, the Department believes its construction of the law to be correct and that it must therefore adhere to it.

Finally, counsel for claimant cite two unreported cases (Guyette Consolidated Placer, decided May 10, 1904, and Kirk Placer, decided June 30, 1904) in which, in view of the equities there apparent, the Department specially excepted the non-conforming placer claims of those names from the requirement under the later decisions. It is contended, in effect, that no difference in principle exists between the circumstances in those cases and the present, and that like consideration should be accorded the latter. It is, however, plainly disclosed by the record that such compliance with the requirements of the mining laws as has been had in this case has been of the most perfunctory character, and that the only basis for an appeal to special consideration is the claimant's reliance upon the former practice observed with respect to non-conforming locations. Indeed, upon further consideration, in the light of this and other like cases which have since been presented, the Department is of opinion that the bounds of strictly statutory authority were passed in the cases cited, and that they cannot therefore be regarded as precedents. No sufficient reason has been assigned for the non-conformity of this claim, and such rights as the claimant may seek to acquire in the premises must be and are subject to its observance of the statutory requirement. As the lands of the vicinity are now surveyed the task is an easy one.

In conclusion, the Department is constrained to say that it is unable to concur in that portion of your office decision which holds that, under the circumstances of the case, the objection to the delay

in perfecting entry under the application for patent would be waived. The only judicial proceedings in which a claim may become involved, resulting in delay which would otherwise be fatal to entry, under the doctrine of *Cain et al. v. Addenda Mining Co.* (29 L. D., 62) and like cases, and which are held to protect the rights of the applicant for patent during their pendency, are those arising under the mining laws themselves, whereby the applicant is prevented from completing his patent proceedings prior to final determination of the litigation. (*Marburg Lode Mining Claim*, 30 L. D., 202.)

The decision of your office is affirmed.

HOMESTEAD ENTRY—SECOND—ADDITIONAL—ACT OF APRIL 28, 1904.

DAVID H. BRIGGS.

A homestead entryman is not entitled to make a second entry under the provisions of the act of April 28, 1904, 33 Stat., 527, upon a showing that he relinquished his original entry for the reason that the land embraced therein was unsuitable for farming purposes and was not of sufficient acreage to enable him to support himself and family by using the land for grazing purposes.

The right of additional entry provided for by section 2 of the act of April 28, 1904, 33 Stat., 547, is limited to persons who theretofore had entered under the homestead laws lands within the territory described in the act, and who own and occupy such lands, and can only be exercised upon lands contiguous to the original entry.

The right of additional entry accorded by the proviso to section 3 of the act of April 28, 1904, 33 Stat., 547, extends to all persons who prior to application to exercise said privilege had made homestead entry, and there is no warrant in the act for further limiting the right, as is done in the instructions of May 31, 1904, issued under said act, to a homesteader who had resided upon and cultivated the land embraced in his original entry for the period required by law.

Directions given that the instructions of May 31, 1904, 32 L. D., 670, be amended to accord with the views herein expressed.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 28, 1905. (C. J. G.)

An appeal has been filed by David H. Briggs from the decision of your office of March 23, 1905, rejecting his application to make second homestead entry under the acts of April 28, 1904 (33 Stat., 527, 547), for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 33, T. 26 N., R. 45 W., NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, T. 25 N., R. 45 W., containing 640 acres, Alliance, Nebraska.

It appears that applicant made homestead entry, March 25, 1899, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 15, T. 24 N., R. 44 W.,

which was canceled on relinquishment July 21, 1904. He claims that he is entitled to make the entry now applied for under section 1 of the act of April 28, 1904 (33 Stat., 527), which provides:

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead laws as though such former entry had not been made.

In support of his claim applicant alleges that during the month of April, 1899, he established residence on the land embraced in the former entry, built a comfortable house, fenced the entire tract and dug a well; that he has since maintained residence upon the land, which not being of acreage sufficient to support himself and family by means of raising cattle and being unsuited for farming purposes, he was compelled part of the time to seek employment elsewhere for earning additional support for himself and family; that since the enactment of the act of April 28, 1904, he believes that with sufficient acreage for grazing purposes he will be enabled to establish for himself and family a home upon a ranch and to raise cattle in numbers sufficient to justify him in making it a home; that there being no available vacant land adjoining his homestead he relinquished the same, for which he received no consideration.

The land applied for is subject to disposal under the act of April 28, 1904 (33 Stat., 547), entitled, "An act to amend the homestead laws as to certain unappropriated and unreserved lands, in Nebraska." It is provided in section 1 of said act—

That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: . . . shall not exceed in area six hundred and forty acres, and shall be as nearly in compact form as possible, and in no event over two miles in extreme length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise.

Section 2 reads as follows:

That entrymen under the homestead laws of the United States within the territory above described who own and occupy the land heretofore entered by them, may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same.

And the first proviso to section 3 of said act is:

That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed six hundred and forty acres.

The circular of instructions issued under said act May 31, 1904 (32 L. D., 670), contains this paragraph:

Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

The Department concurs in the opinion of your office that applicant's showing is not sufficient to bring him within the act of April 28, 1904 (33 Stat., 527), and therefore he is not entitled to make second entry for 640 acres under section 1 of the act of April 28, 1904 (33 Stat., 547), as applied for. He is clearly not entitled to the provisions of section 2 of said act, for it contemplates the entry of additional lands contiguous to lands within the territory described in the act, entered, owned and occupied by the applicant, conditions that are absent under the present application. With respect to the first proviso to section 3 of said act, the instructions thereunder, *supra*, declare:

By the first proviso of section 3, any person who made a homestead entry prior to his application for entry under this act, and has resided upon and cultivated the same for the period required by law, will be allowed to make additional entry for a quantity of land, which added to the area of the land embraced in the former entry shall not exceed 640 acres, but residence and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries.

This paragraph of the instructions, wherein it is declared with reference to the former homestead entry of an applicant under the act of April 28, 1904 (33 Stat., 547), "and has resided upon and cultivated the same for the period required by law," prescribes a limitation not warranted by the purview of said act. The only provision in the first proviso to section 3 of said act, to which said paragraph is directed, is that the tract applied for shall not, with the tract embraced in the former entry, exceed six hundred and forty acres. This being true, the regulation embodied in the foregoing quotation will no longer be followed, and your office will take the necessary steps to correct said instructions in the manner indicated.

In view of the above, while Briggs can not be permitted to enter under said act six hundred and forty acres as applied for by him, he may enter, subject to compliance with the requirements of the homestead law, four hundred and eighty acres, if he so desires, and upon showing proper qualification, his former entry being for one hundred and sixty acres. His application will therefore be approved

for that number of acres, the decision of your office being hereby reversed accordingly.

This decision is substituted for that of the Department in this case dated June 17, 1905, which is hereby recalled and vacated.

FINAL PROOF ON CLAIMS WITHIN FOREST RESERVES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 1, 1905.

Registers and Receivers,

United States Land Offices.

GENTLEMEN: Attention is called to the following reissue of the circular of April 8, 1905, with additions thereto suggested by the Forestry Bureau, Department of Agriculture. The original circular is in full force and effect, the reissue being deemed necessary to more fully emphasize the purpose of the original circular.

(1) Hereafter you will, when issuing notice of intention to make final proof upon claims, either mineral or non-mineral, within an established forest reserve, furnish a copy thereof to the Forest Supervisor in charge of such reserve, in order that he may be enabled to be present at the taking of final proof to examine and cross-examine claimant and his witnesses, or may protest the passage of the mineral application to entry, as the case may be. In the former case, whenever the Supervisor may deem it necessary, the examination may be reduced to writing at the cost of the claimant, and made a part of the final proof in that case. You will request the Forest Supervisor to make proper return of the proof notice, to be made a part of the case, with such notations thereon as he may consider best.

(2) You will carefully examine any proofs for claims within forest reserves, whether mineral or non-mineral, together with any evidence furnished by the Forest Supervisor or brought out by his examination, and either reject, suspend, or approve the same according to the following directions:

(3) If sufficient facts appear upon the face of the record, you will reject the final proof, advising claimant of your reasons therefor, with the right of appeal. No further action thereon will be required from the Forest Supervisor.

(4) If you believe the proof to be fraudulent, or doubtful, but do not have sufficient reasons to justify its rejection, or if the Forest Supervisor has returned the notice with a definite protest against the claim, you will suspend the proof and submit a brief statement of the

facts in the case to the special agent in charge of the district in which said proof is made, such statement to include the names and addresses of claimants and witnesses, and your reasons for the suspension of the proof. You will forward the proof to this office with a copy of your letter to the special agent. The special agent will then proceed to make such investigation as he may deem necessary, and to submit his report on the approved form. Upon the receipt of his report, appropriate action will be taken upon the entire record as then made up.

(5) If you believe the proof to have been made in good faith and that the law has been in all respects complied with, you will pass such proof to entry in the regular order, upon compliance by the claimant with all the requirements therein and on the payment of fees and commissions, but you will in no case issue final certificate or pass a mineral application to entry when any definite protest by a forest officer has been made against the claim.

(6) You will promptly notify the Forest Supervisor of whatever action you take in every case.

(7) The names and addresses of Forest Supervisors will be furnished you by this office. Notices of claims in forest reserves in which there is no forest officer in charge should be forwarded to the Forester, Agricultural Department, Washington, D. C.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

RIGHT OF WAY—FOREST RESERVES—JURISDICTION.

INSTRUCTIONS.

Directions given that all applications for rights of way or other privileges over or upon public lands in forest reserves, now pending before the General Land Office and falling wholly within the jurisdiction of the Department of Agriculture, as defined in departmental letter of June 8, 1905 (concurrent in by the Secretary of Agriculture in letter of June 13, 1905), be transmitted to the Department of Agriculture for consideration and disposition.

Where applications for rights of way or other privileges affect lands lying partly within and partly without forest reserves, and involve questions within the jurisdiction of the Department of Agriculture and also questions within the jurisdiction of the land department, separate applications will not be required, but in such cases the application will be examined, and, if found regular, approved by the land department in so far as it affects lands without the reserve, and then transmitted to the Department of Agriculture for consideration and such action as may be proper relative to the lands within the reserve; but in the event it appear that the right to use lands without the reserve is subordinate to permission to use lands within the reserve, the application should first be passed upon by the Secretary of Agriculture.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 2, 1905.* (G. B. G.)

Your office letter "F" of July 15, 1905, acknowledges the receipt of departmental letter of June 29, 1905, which defined the divided jurisdiction of the Department of Agriculture and the Department of the Interior in the matter of applications for rights of way and privileges in forest reserves, and requests that instructions be given by this Department for the disposition of pending applications the consideration of which properly falls within the jurisdiction of the Department of Agriculture as so defined.

It is also suggested that some of these applications may involve rights and privileges upon public lands partly within and partly without forest reserves, and requested that your office be instructed in the premises.

Upon consideration of the matter, it is directed that all applications pending before your office, in whatever state of preparation, for permission to occupy and use public lands wholly within forest reserves, and questions relative to their allowance wholly within the jurisdiction of the Department of Agriculture, as defined by said departmental letter of June 29, 1905 [see letter of June 8, 1905, 33 L. D., 609], be transmitted by your office to said Department for consideration and disposition, and that the applicant in each instance be duly advised of such action.

As to applications affecting lands partly within and partly without forest reserves, involving questions within the cognizance of the Department of Agriculture, it is not believed that the public interests require that the applicant should, as suggested by your office, be put to the trouble and expense of separate applications, but that the applications should be examined and, if found regular, should be approved by this Department as to such part as falls without the forest reserves, and then transmitted to the Department of Agriculture for its consideration and approval, in so far as it affects the reserve. In the event it appear that the right to use lands without the reserve is subordinate to permission to use lands within the reserve, the application should first be passed upon by the Secretary of Agriculture.

ARID LAND—RECLAMATION PROJECT—IRRIGABLE AREA—LEGAL SUBDIVISIONS.

INSTRUCTIONS.

Public lands lying within the irrigable area of a reclamation project constructed under the provisions of the act of June 17, 1902, can be disposed of only under the homestead law and in conformity with the legal subdivisions defined by the public land surveys.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) *August 2, 1905.* (E. F. B.)

The Department is in receipt of your letter of July 24, 1905, requesting a reconsideration and modification of the "Instructions" of August 21, 1903 (32 L. D., 237, 239), so far as it was therein held that—

As the Secretary has no authority to allow an entry for less than 40 acres, there is also no authority to subdivide a 40-acre tract for combination with other subdivisions. The provision that the lands shall be subject to entry only "under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres" does not imply a power to allow an entry of any amount between said minimum and maximum area, but contemplates that all entries must be made according to the ordinary legal subdivisions. The Secretary may limit the area per entry to the smallest legal subdivision, or may combine with it one or more legal subdivisions, provided the entry will not exceed 160 acres; but he has no power to subdivide or change the ordinary subdivisions fixed by law.

You cite no authority for the modification of this ruling, but base your request solely upon the ground that your office "has been unable to find any positive provision prohibiting the disposal of the public lands in tracts of less than 40-acre subdivisions."

It is a fundamental principle that the public lands can be disposed of under the general land laws only in conformity with the legal subdivisions as defined by the public land surveys. It is to be found throughout the entire public land system from the foundation to the present time.

Lands lying in the irrigable area of every project constructed under the act of June 17, 1902 (32 Stat., 388), can be disposed of under the homestead law only. Section 2289, Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), contains the positive requirement that land entered under the homestead law shall "be located in a body in conformity to the legal subdivisions of the public lands." The same provision was also contained in the original act of May 20, 1862 (12 Stat., 392).

If the conditions referred to in your letter exist to any great extent, which the Department is not prepared to accept, although it does not reject your view, the remedy must be provided by the legislative branch of the government.

MARVIN HUGHITT.

Motion for review of departmental decision of May 8, 1905, 33 L. D., 544, denied by Acting Secretary Ryan, August 4, 1905.

PRIVATE CLAIM—RIGHT OF PURCHASE UNDER SECTION 7, ACT OF JULY 23, 1866—LOCUS OF CLAIM.

COUTS *v.* STRICKLER ET AL.

(RANCHO BUENA VISTA.)

Under the provisions of section 7 of the act of July 23, 1866, persons who in good faith and for a valuable consideration purchased lands from those who claimed and were thought to be Mexican grantees or assigns, are entitled, provided they fulfil the other conditions of the act, to purchase such of said lands found not to be included in the grant as finally surveyed, regardless of what other lands, not within the lines of their original purchase, were finally found to be the lands granted.

Where the tie line purporting to connect the survey of a private land claim with the public-land surveys is shown to be erroneous, the actual locus of the claim as defined and surveyed on the ground must prevail.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 10, 1905.* (J. R. W.)

J. W. Strickler and others, protestants in *Couts v. Strickler et al.* (31 L. D., 446), appealed from your decision of April 5, 1905, approving the resurveys in connection with the boundaries of the Buena Vista Rancho and plats thereof, executed by Deputy Surveyor W. A. Sickler under contract No. 226, dated November 21, 1903.

The appeal seeks to open and again agitate the points in controversy, heard and determined in *Couts v. Strickler, supra*, to which reference is here made, without here again discussing at length the matters attempted to be raised by the appeal that are there discussed. That decision is adhered to. This disposes of all assignments of error, except as hereinafter discussed.

The seventh assignment is that the present survey contains 565.45 acres more than the Hays survey purported to contain, or than the applicant claimed to purchase. The distances on the right, northerly and southerly lines, as run by Sickler, are respectively 134.50 and 134.49 chains, and of the westerly and easterly boundaries 165 chains, giving a product or contents of 2219 $27/40$ acres, which is substantially the area of half of a square league and substantially that surveyed by Hays (2219.08). It may, however, have been intended by the assignment to allege as error that the area of lands patented under the grant with those within the Hays survey not patented, taken together, exceed the original claim under the grant by the amount, substantially, stated in the assignment. This occurs from an error of Hays in his field-notes connecting the westerly line of his survey of the rancho with the range line between ranges four west and three west, instead of with the section line a mile west thereof. That this section line was the one intended by him is shown by the

other calls of his survey and by the possession and asserted dominion of Coutts and his predecessors in estate prior to any survey of the lands west of the ranch house to the road from Milpitas to Guajome. The Treadwell survey adhered to the erroneous connection of the westerly boundary to the range line and about the area of 565.45 acres of the 1109.67 (one quarter of a square league) patented under the grant lay outside and east of the half of a square league as surveyed by Hays. But this fact does not affect the grant claimant's right to purchase the land which, at the time of his purchase, was thought to be within the lines of the grant. In *Beley v. Naphtaly* (169 U. S., 353, 362), after giving reasons for the construction adhered to, the court held that:

For the reasons thus given we think that this act includes those persons who in good faith for a valuable consideration have purchased land from those who claimed and who were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

In *Watriss v. Reed* (99 Cal., 134; 33 Pac., 775, 776), the court held that:

The object of the act was to give to the purchaser from the Mexican grantee the right of purchase from the government. He was assured by the act that if he made his purchase in good faith, took actual possession, and continued the same, and paid a valuable consideration, and the land was believed to be within the grant, he would be treated as a preferred purchaser of the land, and, upon paying for the same, would be entitled to a patent. If respondent's land was not within the lines of the grant, it was supposed to be, and the evidence shows that she honestly believed it to be within such lines, and this entitles her to the protection of the act.

These principles are as applicable to the present case as to that in which they were originally applied, as Coutts purchased in November, 1866, when the Hays survey had stood for eight years approved by the surveyor-general, and express reference was made to it in the deed by the grant claimant to him. The lines so fixed were "the lines of" his "original purchase." So much of those lands as was not included in the grant as finally surveyed the act permits him to purchase regardless of what other lands not within those lines, were finally found to be the lands granted.

The eighth assignment is, in substance, that Surveyor Sickler has not in fact retraced Hays's survey, but has made an original one, shifted about a mile west from that of Hays. This, if true, would be fatal to the present survey, and decisive of the case. This assignment is supported by what purports to be copies of the field-notes and plat of a survey made February 27, 1904, by S. L. Ward, county surveyor of San Diego county, California, as "Being a retracing of the Hays survey of 1858," of the Buena Vista Rancho. The purported copies are without certification or authentication of any

kind, and for that reason alone are not evidence or entitled to be received. But were these documents unobjectionable in that respect, the field-notes bear on their face evidence destructive of their credit. They show:

As there seems to be much uncertainty regarding the starting point, i. e., the N. W. corner of the Indian (Felipe's) Garden, I went to the range line, 33 chains north of the corner to Secs. 30-31-25 & 36, Twps. 11 south, Ranges 3 and 4 west, S. B. M., as referred to in Hays' field notes of his survey and ran thence. . . .

GENERAL OBSERVATIONS.

While very much of the topography as I find it, fails to agree with that given in Hays' field-notes, yet the tract surveyed by his courses and distances includes the land described in Felipe's original claim and checks all right with the range line.

After spending nearly a week on the ground and carefully studying the situation, I am convinced that the Hays survey never was made in the field, but simply projected on paper and the topography written up at random.

It thus appears affirmatively that the controlling question was merely assumed, viz: that Hays was not in error in connecting his survey to the range line, instead of to the section line, a mile west of it. This fatal assumption, or begging of the whole question in controversy, is adhered to, although on the lines run "very much of the topography . . . fails to agree with that given in Hays' field notes," in explanation of which the opinion is advanced "that Hays' survey was never made in the field, but was simply projected on paper and written up at random." It is clear that what the county surveyor set out to do, and what he in his opinion accomplished, was not to ascertain where Hays's lines and monuments lay and to retrace and relocate them, but, first determining where Felipe's garden was, to lay on the ground Hays's courses and distances so as to include the land described in Felipe's original claim and to make an original survey of that tract, irrespective of where Hays may have laid the lines including it—to make a survey as Hays ought to have made it regardless of where he did make it. As the topography of Hays's lines can not be made to conform, the opinion is advanced that Hays's survey was never made in the field.

At conclusion of his field-notes Sickler observes:

The regularity with which this resurvey checks off the topography and other objects noted in the original survey makes it certain that these lines are at least approximately the same, but there is a great discrepancy in connection with the public land survey.

It will be noticed that Hays makes connection with but one public land corner, which he calls the Cor. to Secs. 25, 30, 31, and 36, and that it proves by this survey to be within a few links of the present location of the $\frac{1}{4}$ Sec. Cor. bet. Secs. 25 and 26.

If the subdivision lines had been established at the time Hays made his survey, the error could easily be accounted for. However, the Cor. may have been

set in some private survey, or the deputy who established the range line may have erroneously started from a corner on the Tp. line, a mile too far west, in which case it would be set for the $\frac{1}{4}$ Sec. Cor. bet. Secs. 25 and 30. At any rate it seems certain that this Cor. was in existence at the time Hays made his survey and that when it was pointed out to him he failed to properly identify it.

The survey was carefully examined, and, as to Hays's tie to the range line, the examiner says:

I am firmly of the opinion after careful investigation, that the tie to the range line should be set aside as erroneous for nearly all the topographical features point that way, and there seems to be a persistent and lively tradition in this locality that Hays's No. 1 Cor. is in the vicinity of the Oak stump so often referred to herein.

Again, he says:

At the Cor. point for No. 1 Cor. as fixed by the examiner from Hays's tie to the range line, there is nothing at all in the way of *oak* trees or shrubbery, the growth being almost entirely sage and sumach. I was unable also to find any other oak trees in the vicinity of the alleged Hays bearing tree stump. That old tree seems to be the only live oak in that locality.

There are then under these two professed retracings of the Hays survey two sets of four lines each, aggregating 598.99 chains in each case, or 7.465 miles. In one, taking as an initial point the stump of a live oak, noted by Hays as standing in 1858, all the topographical features noted by him in the way of water courses, ravines, valleys, and ridges, in a mountainous country, and their respective courses and distances, closely agree. That stump is the only live oak discoverable anywhere in the locality. The only real objection to the survey is that it can not be harmonized to Hays's tie to the range line.

The Ward survey, blindly adhering to Hays's tie to the range line and ignoring the live oak, starting from a point where nothing but sage and sumac seem ever to have grown, so disagrees with all topographic features that to sustain it it must be assumed that Hays in fact never made any survey in the field.

Such contention is not founded in sound reason. A tie to the range line, while presumed to be carefully made and accurate, is but one of the calls given by the surveyor to aid in fixing the location of his work upon the face of the earth and its relation to the surveys of the public lands. Such call is but human work and like all works of man subject to liability to mistake. No call of a survey can be infallible, and when all the calls in about seven and a half miles of lines, over ridges, valleys, and streams, substantially agree in one set of lines to show that the survey was in fact made, that it can be laid again upon the surface of the earth, agreeing in every particular save that of its tie to the range line, the proof becomes not merely persuasive, but so clear, cogent, and convincing as irrefutably and conclusively to establish that the tie to the range line was erroneous.

and must be rejected. The facts show conclusively that Hays in fact made his survey, that he accurately measured and noted topographical features, but that he erred in connecting his work to the system of public land surveys, and that his survey has been accurately retraced and is now properly connected to the public surveys. Where the tie to the surveys of public lands is shown to be erroneous, the actual locus of the claim as defined and surveyed on the ground must prevail. *Sinnott v. Jewett* (33 L. D., 91).

Your approval of the survey here in question is affirmed.

SNOW *v.* DICKEN.

Motion for review of departmental decision of March 22, 1905, 33 L. D., 477, denied by Acting Secretary Ryan, August 10, 1905.

TOWNSITES IN ALASKA—PARAGRAPH 13 OF REGULATIONS OF AUGUST 1, 1904, AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 12, 1905.

Section 13 of the regulations concerning the manner of acquiring title to townsites on public lands in the District of Alaska (33 L. D., 163, 170) is hereby amended by inserting after the first paragraph therein the following additional paragraph thereto, to-wit:

In addition to the method prescribed by the Rules of Practice for taking depositions hereinbefore made applicable to town lot contests, depositions of witnesses to be used in such contests may be taken in the District of Alaska on notice, within the same time, under like conditions, in the same manner and form, and before the same officers, to be certified and transmitted to the trustee in like manner and form, to be used in such contest cases with like effect, with all the privileges and under all the restrictions, as provided in chapter sixty-three of the act of June 6, 1900 (31 U. S. Stat., 321, 436); and the trustee is hereby clothed with all the power in issuing orders in reference to taking such depositions and admitting them in evidence in such contest cases, as is conferred by said chapter upon the court or judge of the district court.

J. H. FIMPLE, *Acting Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

MINING CLAIM—LODE WITHIN PLACER—APPLICATION FOR PATENT.

JAW BONE LODE *v.* DAMON PLACER.

Whenever proceedings under an application for mineral patent have failed, by reason of a default incurable as to them, the application stands rejected, but may, if not in itself or for any extrinsic reason fatally defective, be made the instrument of renewed proceedings. It is not, however, in the interval a pending application, and can be considered as renewed, and as again taking effect, only as of the date proceedings under it are actively resumed.

An application for patent embracing a lode within the limits of a placer claim for which patent application is pending can not be permitted to proceed beyond the point of filing in the absence of a determination by the land department that the lode was known to exist at the date of the filing of the placer application; and the law does not contemplate a proceeding to that end before the land department, or the acceptance by the letter of such lode application, when an adverse suit against the placer applicant has been begun by the lode claimant, during the pendency of which all proceedings in that department must be stayed.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 14, 1905.* (F. H. B.)

May 23, 1895, the F. F. V. Placer and Mining Company filed application for patent to the Damon placer mining claim, survey No. 9295, Pueblo, Colorado, land district. During the period of publication of notice thereof, which expired August 28, 1895, various adverse claims were filed and suits commenced thereunder, which remained pending for several years.

February 19, 1896, C. A. Johnson *et al.*, claiming as owners of a lode mining claim, called Jaw Bone, in conflict with the placer claim, filed protest against the application, in which it was alleged, in substance and effect, that five hundred dollars, in labor or improvements, had not been expended on the claim; that not to exceed two and a half acres of the land embraced in the application is placer in character; that lodes or mineral deposits in place were known by the placer locators to exist at the time of the location of the placer claim; and that, February 2, 1896, protestants discovered a vein or lode within the placer limits and made lode location thereon.

A hearing followed, at which the several parties appeared and submitted testimony. In due course the local officers returned their joint finding, substantially, (1) that the land embraced in the Damon application is placer in character; (2) that it has not been shown that any lodes were known to exist in the ground at the date of the placer patent application; and (3) that it is shown that more than \$500, in labor and improvements, were expended on the claim prior to August 28, 1895: wherefore, the protest was dismissed.

Upon appeal by protestants, your office, by decision of May 15, 1903, sustained the findings and action of the local officers; and protestants thereupon appealed to the Department.

By decision of January 16, 1904 (unreported), the Department, affirming your office decision in other respects, found from the evidence submitted at the hearing that the statutory requirement of an expenditure of \$500, in labor or improvements, prior to the expiration of the period of publication of notice of the placer patent application, had not been satisfied, and reversed the decision of your office to that extent, "without prejudice to the right of the" placer "claimant to commence patent proceedings anew, if it so desires."

March 7, 1904 (decision unreported), the Department denied motion for review of its decision, and declined to pass upon a request preferred in connection with the motion that, should the latter be denied, the applicant company be permitted to publish and post new notices of its pending application, without filing new application, and to submit in that connection further showing of compliance with the law in the matter of expenditures.

March 15, 1904, your office formally notified the local officers that, pursuant to the departmental decisions, the application for placer patent was "accordingly canceled."

By copies of papers transmitted to the Department December 9, 1904, by resident counsel for protestants, it was disclosed that, following the denial of the motion for review, as above, resident counsel for the placer claimant, under his construction of the expression "pending application," used in that decision with reference to the request preferred in connection with the motion for review, and without notice to protestants, filed in your office a "motion to return application papers to local land office, and for leave to republish notice thereof," which he urged as sanctioned by the Department's expression. Upon receipt and consideration of the motion, it also appears, your office had, on April 6, 1904, revoked "the cancellation of said mineral application" and authorized the republication and reposting of notice thereof, citing the case of Highland Marie and Manilla Lode Mining Claims (31 L. D., 37, 39) as authority for such new notice. Against that action, as in disregard of the judgment rendered by the Department, and as prejudicial "to the rights of the contestants in and to their known lodes within the limits of the placer," they protested, and asked "that instructions be given to prevent any action under said decision." Denying, by unreported decision of December 30, 1904, this request, which in effect, equally with the earlier request of the placer claimant in connection with its motion for review, raised the question of the effect to be accorded the placer application under which proceedings had been renewed, and regarding it as an improper time and occasion for, and therefore

avoiding, any expression of opinion in that behalf, the Department added:

However, the lode claimants are not hereby precluded from pressing their asserted rights before the land department in an appropriate manner, bringing forward all the facts and circumstances upon which they rely and thus raising an issue which may be determined after all those concerned have had full opportunity to be heard.

January 7, 1905, counsel for the lode claimants presented to your office a formal request that the order (April 6, 1904) reinstating the rejected placer application and authorizing republication and reposting of notice thereof be vacated, and urged that the departmental refusal to instruct to that effect proceeded upon the ground that "the action to bring about a correction of the erroneous decision of your office should not have been commenced in the Department." In opposition, it was stated on behalf of the placer claimant that new notice of the application in question had already been given, during the period of publication of which an adverse claim had been filed and the jurisdiction of the land department in the premises thus temporarily suspended.

By decision of January 31, 1905, your office denied the request for vacation of its order of April 6, 1904, saying:

The records of this office show that on June 6, 1904, Thera H. Satterlee *et al.*, as owners of the Jaw Bone lode (presumably the same Jaw Bone lode claimed by Johnson *et al.* and concerning which testimony was submitted at the original hearing in this case) filed adverse claim No. 2158 against the Damon placer. It would appear therefrom that the owners of said Jaw Bone lode have asserted their adverse claim in the manner prescribed by statute and that all proceedings in the land department concerning said application other than filing proof of publication, posting, etc., must be stayed to await the termination of said adverse.

In the names of Johnson *et al.*, the former protestants and then lode owners, in whose names the proceedings on behalf of the lode claim and above detailed had been conducted, an appeal from that decision has been taken to the Department. These parties had, however, it would appear, a considerable time prior thereto been succeeded in interest by Thera H. Satterlee and two others; but as the appeal may be effectually disposed of on another ground, the cessation of appellants' interest need not be here considered but merely noted in explanation of the proceedings hereinafter mentioned.

It also appears that in the meantime, during the period of republication of notice of the Damon application for patent, and on June 6, 1904, Satterlee *et al.*, as the then claimants of the Jaw Bone lode claim, filed in the local office their adverse claim and seasonably commenced suit thereunder.

December 16, 1904, the adverse claimants also filed in the local office their application for patent to the Jaw Bone claim. This applica-

tion the local officers rejected on the same day, because of its conflict with the placer application and also because of the pendency of the adverse suit involving the ground thus in conflict between the two claims. From this action the lodé claimants appealed to your office, upon the ground, in substance and effect, that it was error to reject their application because of conflict with a placer application which had been "duly canceled on a judgment of the Secretary of the Interior," and to hold that because an adverse claim had been filed as against the "erroneously pending application" and suit commenced thereon, all proceedings before the land department must be stayed.

By decision of February 23, 1905, your office sustained the action of the local officers, for reasons substantially as follows: That by it the placer application in question had been reinstated and permission given for republication and reposting of notice, and submission of proofs thereunder; that an application for lode patent, in conflict with a pending application for placer patent, can not be allowed to proceed in the absence of a determination by the land department or a court of competent jurisdiction that the lode was known to exist at the date the placer application was filed, and no such determination had been had in the present case; that it appears from the record that these lode claimants had seasonably filed their adverse claim as against the placer application and instituted suit thereon in a court of competent jurisdiction; that if claimants of lodes within placer limits elect to file adverse claims, pursuant to section 2326, Revised Statutes, and submit their claims to adjudication by the court, the law does not contemplate that they may at the same time assert before the land department their claims of rights under the general exception and reservation created by section 2333, Revised Statutes; and that, having elected to institute adverse proceedings, and until the final determination thereof, these lode claimants are precluded from prosecuting further proceedings before the land department.

From this decision, also, the lode claimants have appealed to the Department. Their assignments of error are found, upon analysis, to amount practically to those set out in their appeal to your office.

Although the later of the appeals taken here is broader in its scope, each is closely related to the other in that it challenges the action of your office in reinstating the rejected application for placer patent and authorizing republication and reposting of notice thereof. The effect of that action determined, the situation will be found to be relieved of difficulty.

It is true that departmental decision of January 16, 1904, *supra*, held the original placer patent proceedings to have failed, by reason of a default which could not be cured under those proceedings; and the expressed recognition of the right of the applicant "to commence

patent proceedings anew" implied the course necessary to be pursued to secure the desired patent. The application for patent being the means whereby the orderly course of the patent proceedings proper is actively entered upon before the local office, the failure of those proceedings is the failure of the application, which necessarily stands rejected. Therefore, the nature of the default considered, the placer applicant here was obliged to retrace its steps, and renew its application for patent. To have required, however, the filing of a new formal instrument for that purpose, a duplicate of the original "application" save as to its date, would have been uselessly to encumber the record. In the case cited by your office (Highland Marie and Manilla Lode Mining Claims, *supra*) the Department authorized the renewal of patent proceedings, following a default like the present, under a formal application for patent already on file. It was not there held, however, and it is not to be understood, that in that or the present, or in any such, case the application took, or could take, effect as of the date originally filed. Once rejected, it can again take effect only as of the date it is renewed. In the interval, though present in the files, it can not be considered a "pending application," despite any inadvertent expression to the contrary, and constitutes no barrier to an application by another within the meaning of paragraph 44 of the mining regulations (31 L. D., 474, 482). *Stemmons et al. v. Hess* (32 L. D., 220). It is renewed, and again becomes effective, only when proceedings under it are actively renewed. As this case conspicuously illustrates, it is not within the contemplation of the law that an application for placer patent, proceedings under which have failed and are subsequently renewed, is to be treated as continuously of effect from the date on which it was originally filed, and as having fixed that as the date relative to which the question of the known existence of lodes within the placer limits is to be determined. If for no other reason, the contrary construction should be rejected as tending to invite the institution of defective patent proceedings, and upon their failure the dilatory renewal thereof, the application thus continuing to stand as a barrier to the acquisition by others of such rights as they might otherwise enjoy.

An application for mineral patent which has thus been rejected may, then, unless in itself or for any extrinsic reason fatally defective, be made the instrument of renewed patent proceedings. In any such case, however, it must be treated as re-filed (and should be so endorsed by the register), and as again taking effect, as of the date formal application is made to that officer for republication of notice thereof, which must in all cases be promptly had. Where in any case that date can not afterwards be ascertained the application must of necessity be held to have taken renewed effect as of the date of the first publication of the new notice.

In view of the foregoing it follows that the action of your office in reinstating the placer application and authorizing republication and reposting of notice thereof, was not and could not have been prejudicial to any rights of the lode claimants in the premises. By way of emphasis of this it appears, by a certificate of the clerk of the district court of Teller county, Colorado, that since these appeals were taken the jury, sitting in the before-mentioned adverse suit between the parties here, found the issues joined therein for the lode claimants and that they "are entitled to the possession and occupancy of all the ground in conflict between the Jaw Bone lode mining claim and the Damon placer mining claim," and that judgment has been entered accordingly. If the facts were presented to the court as they have been presented here, the court must necessarily have taken the view hereinabove expressed.

So far as the appeal from your office decision of February 23, 1905, questions the reinstatement of the placer application, it is fully answered by what has been said above. In addition it may be said that your office committed no error in rejecting the application for lode patent, because of the pendency of the adverse suit between the parties. Although in such a case as this the remedies open to the lode claimant present possibilities of difference in scope, in that under an adverse suit pursuant to section 2326, Revised Statutes, his claim *may* be sustained in his behalf to its full extent as located, whilst in a proceeding before the land department, and in reliance upon the reservation under section 2333, there can thereby be awarded to him only his lode and twenty-five feet of territory on each side of its center (Daphne Lode Claim, 32 L. D., 513), the essential issue of the latter proceeding, the known existence of the lode, is presumed to be raised in the former, as it must be if the case is truly presented, and can be fully determined. It is clear that an application for patent embracing a lode within the limits of a placer claim for which patent application is pending can not be permitted to proceed beyond the point of filing in the absence of a determination by the land department that the lode was known to exist at the date of the filing of the placer application (in this case, the date the latter was renewed); and the law does not contemplate a proceeding to that end before the land department, or the acceptance by the latter of such lode application, when an adverse suit against the placer applicant has been begun by the lode claimant, pending final determination of which, under the stay commanded by the statute (Sec. 2326, R. S.), the adverse claimant could not be permitted to prosecute independent patent proceedings as to the land in controversy (Long John Lode Claim, 30 L. D., 298).

The decisions of your office from which the pending appeals are taken are affirmed.

ARID LAND—PAYMENT FOR USE OF WATER—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

There is nothing in the act of June 17, 1902, to prohibit a graduated scale of the annual payments required of users of water from reclamation projects constructed under said act, and in all cases where it is deemed advisable this plan of payment may be adopted.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) " *August 16, 1905.* (E. F. B.)

In your letter of June 6, 1905, you enclose a letter from the Malheur Water Users Association, stating that if the users of water within the Malheur project are required to pay the contemplated cost of construction, forty dollars per acre, in ten equal annual payments, the cost of the project will be prohibitive. They ask that a graduated payment of one dollar for the first year, two dollars for the second year, three dollars for the third year, four dollars for the fourth year, and five dollars per annum for the remaining six years, be permitted.

You state that the Board of Engineers recommend that the first annual payment be small and that successive payments increase gradually, in which you concur, for the reason that the conditions for developing the project would be best subserved by such an arrangement.

There is nothing in the act to prohibit a graduated scale of payments, and in all such cases where it is advisable to do so, it will be adopted.

TIMBER CUTTING—SMELTING PURPOSES—SECTION 8, ACT OF MARCH 3, 1891.

BERT D. WHITE.

The provisions of section 8 of the act of March 3, 1891, as amended by act of the same date, conferring upon the residents of certain States and Territories authority to cut timber on the public lands for agricultural, mining, manufacturing or domestic purposes, contemplate the cutting and use of timber for smelting purposes.

Assistant Attorney-General Campbell to the Secretary of the Interior,
August 18, 1905. (E. F. B.)

A letter from the Commissioner of the General Land Office of July 27, 1905, resubmitting an application by Bert D. White for permit to cut lumber on the public lands under authority of section 8 of the act of March 3, 1891 (26 Stat., 1095), has been referred to me for

opinion as to whether or not the application can be granted as to that portion of the timber desired for smelting purposes.

Said section as amended (26 Stat., 1093) provides that in Montana and other States and Territories named therein—

in any criminal prosecution or civil action by the United States for a trespass upon such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show, that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof, for agricultural, mining, manufacturing or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy eight, providing for cutting of timber on mineral lands.

The regulations prescribed by the Secretary for carrying into effect the provisions of the act declare that its operation shall be confined to non-mineral lands, as the act specifically provides that it shall not operate as a repeal of the act of June 3, 1878 (20 Stat., 88), "which makes provision in said States and Territories for the free cutting of timber on the public lands that are known to be of a strictly mineral character for the uses named in said act."

In the instructions governing the granting of permits for the cutting of timber from the mineral lands under the act of June 3, 1878 (29 L. D., 571), "no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining."

In the instructions for carrying into effect the provisions of the act of March 3, 1891 (29 L. D., 572), the uses for which timber may be taken by settlers and other residents of the State or Territory are defined in section 3 to be "strictly for their own use for firewood, fencing, building; or other agricultural, mining, manufacturing or domestic purposes," and in section 5 it is stated that "the uses specified in section 3 . . . constitute the only purposes for which timber may be taken from the public lands in said States and Territories, under this act."

While there is no specific prohibition against the use of timber for smelting purposes in the instructions last referred to, the two acts have been administered by the land department as conferring the same benefits and privileges and containing the same limitations and restrictions as to use, differing only in this, that one is confined to mineral, and the other to non-mineral, lands, hence by necessary im-

plication the regulations of the Department forbid the taking of timber from non-mineral lands for smelting purposes.

The question as to whether a permit can be given for the taking and use of timber from non-mineral lands under authority of the act of March 3, 1891, is submitted for opinion in view of the decision of the Supreme Court in *United States v. United Verde Copper Co.* (196 U. S., 207), which holds that smelting is a domestic industry contemplated by the terms of the act of June 3, 1878, and that the Secretary of the Interior cannot, by regulation, abridge the permission given by Congress so as to deprive a domestic industry from the use of timber as authorized by said act.

The decision involved a construction of the act of June 3, 1878, authorizing the free use of timber from mineral lands, and as the Department has construed and administered the acts as having practically the same scope and purpose, and containing the same limitations and restrictions, that decision would seem to control as to this application, unless there is a material distinction in the two acts.

In the act of June 3, 1878, the language is "for building, agricultural, mining, or *other* domestic purposes," whereas the language in the act of March 3, 1891, is for agricultural, mining, manufacturing, or domestic purposes," the word "other" being omitted in the later act.

This omission would seem to be of minor importance, especially in view of the fact that the two acts have been construed as having the same purpose, differing only as to the character of the lands from which the timber may be taken, were it not for the fact that the court gave to the word "other" material weight as an important factor in the interpretation of the statute.

After observing that the permission given by the statute is not confined to the special enumeration of industries, but extends to "other domestic purposes," the court says—

Counsel for the Government recognizes this, and substitutes for "domestic" the word "household," and contends that the word "other" should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for "building, agricultural, mining or domestic purposes." But we are not permitted to take such liberty with the statute, if "domestic" has a meaning consistent with the intentional use of the word "other." It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the house but those of a county, state or nation, according to the object in contemplation. So in the state the word "domestic" applies to the locality to which the statute is directed, and gives permission to the industries there practiced to use the public timber. This definition of "domestic" gives the word an apt and sensible meaning, and we must regard the association of the word "other" with it as designed, not as accidental.

So that although smelting may be a separate industry from mining, it is not deprived of the license given by the statute, as the general clause "other domestic purposes" is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated."

The important significance given by the majority of the court to the word "other," as used in the statute, is further illustrated by the views expressed in the dissenting opinion that the word "other" can not be used as an enlargement of the word "domestic," "and that it should be confined, as are the preceding words, to timber used for other analogous structural purposes and for household consumption—in short, to other purposes domestic in their character."

Construing the two acts in the light of that decision alone, the omission of the word "other" from the act of March 3, 1891, must be regarded "as designed, not as accidental," and that it was the intention of the legislature to limit the free use of timber taken from non-mineral public lands, to the industries specifically enumerated and for household consumption, or uses strictly domestic in their character, as the absence of the enlarging word "other" associated with the word "domestic" limits the operation of the general clause.

But the several acts authorizing the free use of timber from the public lands, having application respectively to particular localities or the character of the lands, have the same general scope, purpose and limitation and must be construed in *pari materia*.

Substantially the same right that is given by the act of March 3, 1891, to the free use of timber from the unreserved public lands for domestic purposes, is by the act of June 4, 1897 (30 Stat., 11, 36), extended to forest reservations. That act provides—

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used in the State or Territory, respectively, where such reservation may be located.

The act of July 1, 1898 (30 Stat., 597, 618), authorizes the Secretary of the Interior—

to grant permits under the provisions of the 8th section of the act March 3, 1891, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the Continental Divide on the Snake River and its tributaries to the boundary line of Idaho, for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.

The question as to whether this act authorized the cutting and removal of timber from forest reservations within the locality men-

tioned by the act, was considered by the Department in its letter of September 19, 1902 (31 L. D., 412-415), and it was held that "these several acts must be construed in *pari materia* and such effect must be given to the act of June 4, 1897, as if the act of July 1, 1898, was in terms incorporated therein."

In both of these acts, which merely extended the provisions of the section of the act of March 3, 1891, to certain reservations and enlarged the territory from which certain citizens could procure timber for the uses and purposes contemplated by said act, the word "other" occurs, which the court, in the case cited, construed as enlarging the operation of the term "domestic" as associated in the general clause.

Giving to the words "or other domestic purposes," as they occur in the one case, "and other domestic purposes," as they occur in the other, the same significance and operation that was given to those words by the court in the interpretation of the act of June 3, 1878, it is manifest that the omission of the word "other" from the act of March 3, 1891, was not intended to make any distinction in the different acts as to the purposes for which the free use of timber upon the public lands may be permitted.

Considering that it was not intended by the act of June 4, 1897, and July 1, 1898, to extend the uses for which timber may be taken beyond that contemplated by the act of March 3, 1891, and that any domestic industry having relation to the industries specifically enumerated, may come within the meaning of the general clause "other domestic purposes," as held by the court in the case cited in construing the act of June 3, 1878, I am of the opinion that the permit in this case may be granted as to that portion of the timber desired for smelting purposes.

Approved:

THOS. RYAN,

Acting Secretary.

PRACTICE—REOPENING OF CLOSED CASE—SUPERVISORY POWER.

DOLL *v.* JONES.

After a case involving conflicting claims to a tract of public land has been closed in the land department, the Secretary of the Interior, in the exercise of his supervisory power, will, upon reopening the case for further consideration, be governed by the same rule, in determining the rights of the parties, as is observed by the courts in a proceeding to charge the holder of a patent from the United States as trustee; that is, it must not only be shown that the party to whom the land has been awarded is not entitled to it, but that the party attacking his claim has the better right thereto, and that if the law had been properly administered, the land would have been awarded to him.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 19, 1905.* (E. F. B.)

This petition is filed by Osceola Jones praying for the exercise of the supervisory authority of the Secretary of the Interior in the matter of his homestead entry, made October 8, 1901, for the NW. $\frac{1}{4}$, Sec. 3, T. 6 N., R. 15 W., Elreno, Oklahoma, which was held for cancellation by decision of your office of August 25, 1904, for conflict with the application of John Doll to make homestead entry of said tract, and was finally canceled November 26, 1904. The petition has been served upon John Doll, who has filed his answer thereto, and it will therefore be considered upon the facts alleged, which are either not denied or are admitted in the answer.

John Doll filed a sailor's declaratory statement for a tract of land in the territory opened to settlement and entry by the proclamation of the President of July 4, 1901, and on September 4, 1901, tendered a relinquishment of his filing for said land and applied to make another declaratory statement to embrace the land in controversy which is also within the same territory. His application was transmitted to the Department, and by decision of September 30, 1901 (not reported), it was held that Doll was not entitled to file a sailor's declaratory statement, as his naval service covered only a period of six weeks, but in view of the erroneous action of the local officers in allowing him to file such statement, and of the peculiar circumstances disclosed by the record, it was held that his right to make homestead entry under his drawing should not be lost. It was ordered that his relinquishment of the then existing filing be accepted and that upon presenting formal application to enter the land applied for and showing his qualification, his application be accepted subject to any prior adverse claim.

October 8, 1901, Osceola Jones was allowed to make homestead entry of the tract in question "subject to John Doll's application to make a second S. D. S."

Subsequent to Jones's entry, the letter of the Department was received at the local office with instructions to allow Doll to file formal application to make homestead entry of the tract, which he did within the time required. His application was rejected by the local officers because of the entry of Jones and was transmitted to your office December 14, 1901. Jones was then required to show cause why his entry should not be cancelled for conflict with the application of Doll, to which he responded by alleging that Doll was not qualified to file a sailor's declaratory statement; that he was speculating on his second filing, having listed it for sale; and that respondent was the prior settler, having made valuable improvements on the land in which he was living with his family. He asked for a hearing.

The matter was referred to a special agent of your office to examine the land originally applied for by Doll and also the land in controversy. He reported that the tract first selected by Doll was a valuable claim; that Doll had offered to sell the land embraced in his second application and had not acted in good faith; that Jones had resided on the land with his wife and children and in law and equity has the better right to the claim. After the report of the special agent was received you ordered a hearing, which was had September 8, 1903.

The land having been entered by Jones, the burden of proof was upon Doll, who offered testimony to the effect that the land he first applied for was worthless; that he never offered to sell his relinquishment of the second tract; and stated that he listed the land for sale "under pretensions and with reason" which he explained as follows:

It was in my mind that after I learned that Jones's filing was on record as a subject for filing, that it was put on for the sole purpose of trying to defraud me out of my homestead right wherein I tried to learn or discover the true facts of the case some way or other. Finally I dropped it altogether and paid no more attention to it.

Jones demurred to the evidence and moved to dismiss the contest, substantially upon the following grounds: (1) That the evidence does not show that Doll was entitled to make a second filing; (2) because the evidence does not warrant the cancellation of Jones's entry, but on the contrary shows that it should remain intact; and (3) that Doll was not entitled to file a sailor's declaratory statement. The local officers sustained the motion and dismissed the contest.

When the case came before your office on the appeal of Doll you held that the question as to the right of Doll to make a sailor's declaratory statement was determined by the decision of the Department of September 30, 1901, which allowed him to make homestead entry of the land applied for, subject to any prior adverse right; that there was no adverse claim until October 8, 1901, when Jones made entry of the tract subject to the prior application of Doll to file his sailor's declaratory statement. You found that Doll had not offered the tract for sale and that as he had not been allowed to make entry he was not bound to improve the land. You reversed the local officers, but instead of remanding the case to allow Jones to submit his testimony, his entry was held for cancellation, subject to the right of appeal, which he failed to file in time, and the entry was cancelled November 26, 1904.

Subsequently, Jones filed his appeal, which you refused to transmit, and the Department, by decision of January 19, 1905 (not reported), denied his petition for certiorari because of his failure to file a copy of the decision of your office with his petition and because it did not present such a case as to invoke the supervisory power of

the Secretary. The case was finally closed by your office February 2, 1905.

The principal ground upon which the claim of Jones rests is that the entire record upon its face shows that Jones's entry was subsisting as a valid adverse claim at the date when Doll made his formal application to make homestead entry of the tract and that said right has not by any act of Jones been forfeited or subjected to the right or claim of Doll.

A determination of that question involves a construction of the decision of the Department of September 30, 1901, upon the application of Doll to make a second sailor's declaratory statement to embrace the land in controversy. It held that Doll was not entitled to file a sailor's declaratory statement, but in view of the erroneous action of the local officers in allowing him to make such filing, and of the circumstances disclosed by the record, referring evidently to Doll's allegation as to the character of the land first filed upon, it was determined that he should not be held to have lost his right to make homestead entry under his drawing, and the local officers were thereupon directed to accept his relinquishment of his then existing filing and to allow him to make homestead entry of the tract embraced in his second application upon presenting a formal application therefor, subject to any *prior* valid adverse claim.

When Doll presented his formal application to make homestead entry of the land November 15, 1901, it was rejected by the local officers because it conflicted with Jones's entry, which had been allowed October 8, 1901, "subject to John Doll's application to make a second S. D. S."

Your office in reversing their action construed the decision of the Department to mean that the application of Doll to make homestead entry related back to the filing of the second sailor's declaratory statement and defeated the intervening claim of Jones.

In view of the fact that Doll had no right to file a sailor's declaratory statement, which was directly decided by the Department, and initiated no right whatever by such filing, it is an erroneous construction to hold that the Department intended to recognize such filing as conferring an incipient or initial right to which the formal application to make homestead entry would relate as of that date, and cut off all intervening claims, unless such intention were clearly or necessarily implied. When the Department said that "he should not be held to have lost his right to make homestead entry under the drawing," it meant that his right to make entry within the preferred period of sixty days allowed to regular applicants under their drawings before the lands were opened to entry by the public generally should not be lost by reason of his effort to obtain lands under a right that he did not possess. As that period might expire before he could

be served with notice of the decision, he was allowed additional time (thirty days after notice) in which to make formal homestead application for the land, "subject to any prior valid adverse claim." His application was not presented until after the sixty days' period had expired, and when presented the land had been entered by Jones, subject only to whatever right Doll had under his second sailor's declaratory statement. As he acquired no right under that declaratory statement, Jones's entry constituted a "prior valid adverse claim," which was subsisting when Doll's relinquishment of his former filing was accepted and his formal application to make entry of the tract was tendered, so that the only benefit conferred by the decision of the Department was the restoration of his homestead privilege. It was not intended that such privilege when formally exercised should relate back to the filing of the declaratory statement so as to validate that filing as the initial claim of Doll to the tract. If such had been the purpose of the Department, or if it had intended to recognize any right in Doll under such filing, it would have allowed him to make entry of the tract applied for subject only to "any prior valid adverse claim" *existing at the date of such filing*. The fact that it did not so protect his "formal application" to make entry thereof is evidence that it did not intend to recognize any right in Doll under such filing.

In your decision of August 5, 1904, you stated that the point raised by Jones, "that Doll had no right to make a soldier's or sailor's declaratory statement, was fully passed upon by the Department September 30, 1901, and is *res adjudicata*." That is true, but the decision was not favorable to Doll. On the contrary, it was directly adverse to him upon that contention and was in favor of the contention of Jones before the local officers.

It is true in this case Jones failed to appeal from the decision of your office within the time allowed by the rules, and his petition for certiorari was dismissed because of a technical non-compliance with a rule of practice. For that reason the Department has not considered any of the charges as to the failure of Doll to comply with the law, and the alleged errors and irregularities in the proceedings in failing to remand the case to the local officers to allow Jones to submit his testimony, and in deciding the issue alone upon the testimony submitted by Doll.

If the only question presented by this petition were the failure of Doll to comply with the law, it would not be entertained. Jones's claim rests not upon the default of Doll, but upon a superior, prior right to the land which has been denied him by an erroneous interpretation of the decision of the Department, and the mere failure to observe and comply with rules of procedure should not bar his right to relief.

Where a party seeks to charge the holder of a patent from the

United States as trustee, he must not only show that the patentee is not entitled to the land, but that the claimant has the better right to the land, and that if the law had been properly administered, the title would have been awarded to him. *Bohall v. Dilla* (114 U. S., 47); *Sparks v. Pierce* (115 U. S., 408); *Lee v. Johnson* (116 U. S., 48).

The same rule will ordinarily control the decision of the Secretary of the Interior in determining as to the rights of parties to a tract of public land at any time before the issuance of the patent, where the case has been closed. In such cases he will exercise the supervisory power conferred by law to see that justice is done to all parties, and that the public land is disposed of only to the party entitled to it. *Knight v. Land Association* (142 U. S., 161).

Your decision, so far as it disregarded the prior right of Jones by reason of his existing entry, which constituted a valid adverse claim to the land at the date of Doll's application to make homestead entry thereof, was error, and upon that ground it is reversed.

Inasmuch as Jones's entry has been canceled and Doll has been allowed to make entry of the tract, you will require him to show cause why his entry should not be canceled and the entry of Jones reinstated, and if he fail to show cause, upon sufficient ground other than that herein decided adversely to him, within a time to be fixed by your office, his entry will be canceled and the entry of Jones will be reinstated.

HOMESTEAD ENTRIES IN NEBRASKA UNDER SECTION 3, ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 21, 1905.

Registers and Receivers,

United States Land Offices, Nebraska.

GENTLEMEN: The circular of instructions, dated May 31, 1904 (32 L. D., 670), under the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid Act, which permits entries of certain lands in Nebraska to embrace 640 acres, provides as follows with regard to additional entries under the first proviso to section 3 of the act:

By the first proviso of section 3, any person who has made a homestead entry prior to his application for entry under this act, and has resided upon and cultivated the same for the period required by law, will be allowed to make an additional entry for a quantity of land, which added to the area of the land embraced in the former entry shall not exceed 640 acres, but residence and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries.

On July 28, 1905, in the David H. Briggs case (34 L. D., 60), the Acting Secretary of the Interior held that said paragraph—

wherein it is declared with reference to the former homestead entry of an applicant under the act of April 28, 1904 (33 Stat., 547), "and has resided upon and cultivated the same for the period required by law," prescribes a limitation not warranted by the purview of said act. The only provision in the first proviso to section 3 of said act, to which said paragraph is directed, is that the tract applied for shall not, with the tract embraced in the former entry, exceed six hundred and forty acres. This being true, the regulation embodied in the foregoing quotation will no longer be followed.

In view thereof, said paragraph of the instructions is amended to read as follows:

By the first proviso of section 3, any person who made a homestead entry prior to his application for entry under this act, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

FOREST RESERVE—SELECTION UNDER ACT OF MARCH 2, 1899—ACT OF
JUNE 6, 1900.

COMSTOCK *v.* NORTHERN PACIFIC RY. CO.

The provision of the act of June 6, 1900, which declares that subsequently to October 1, 1900, "all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, . . . shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry," applies only to selections made under the provisions of the act of June 4, 1897, and has no application to selections made by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 21, 1905.* (E. J. H.)

The above entitled case is before the Department upon the appeal of Charles L. Comstock from your office decision of February 11, 1905, sustaining the action of the local officers in rejecting his homestead application, tendered February 24, 1904, for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 29, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 30, T. 39 N., R. 5 E., Lewiston, Idaho,

land district, for conflict with the prior selection thereof by the Northern Pacific Railway Company, in lieu of land relinquished within the limits of the Pacific Forest Reserve, under the act of March 2, 1899 (30 Stat., 993).

It appears that the relinquishment by the railway company of its lands within the limits of said forest reserve, was accepted by departmental letter of July 26, 1899, in which it was said that the railway company was authorized to select other lands in lieu thereof and that acting thereon the company, on April 24, 1901, prior to survey, made selection of the above described tracts, with others, per list No. 30.

February 24, 1904, the township plat of survey was filed in the local office and on the same day Comstock tendered the homestead application in question, alleging settlement on the land April 19, 1902. His application was rejected for conflict with the railway selection, and he appealed.

March 21, 1904, the railway company filed a new list of selections, embracing the tracts in question, describing the same according to the plat of survey, as required by said act of 1899.

The questions at issue in this case were mainly considered in the case of *Ferguson v. Northern Pacific Railway Company* (33 L. D., 634), wherein departmental decision was rendered in favor of the railway company. The further claim is, however, made in this case that under the act of June 6, 1900 (31 Stat., 614), selections of land in lieu of land relinquished within the limits of a forest reserve could, after October 1, 1900, only be made from *surveyed* land, and in support thereof paragraph 4 of Circular of Instructions of July 7, 1902 (31 L. D., 372), is cited.

The act of June 6, 1900, *supra*, declares—

that all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June 4, 1897, . . . shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October 1, 1900, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

It will be noted that by the terms of said act, it applies only to selections made under the provisions of the act of June 4, 1897 (30 Stat., 36), and not to those made under the act of March 2, 1899, in question. The latter is a special act which dedicated and set apart a portion of the lands in the Pacific Forest Reserve, in the State of Washington, as a public park, to be known as the Mount Ranier National Park, and made provision for the relinquishment by the

Northern-Pacific Railway Company of its lands therein, and for the selection of other lands in lieu thereof. Said railway company, therefore, was not confined in making selections after October 1, 1900, under the act of March 2, 1899, to surveyed lands.

It is not claimed that Comstock made settlement on the land in controversy until a year after the railway company's original selection thereof. Such settlement was, therefore, subject to the company's right to perfect its selection after survey, which it did by filing a new list of selections, embracing said tracts, within the prescribed period.

Your office decision is affirmed.

SETTLEMENT—NOTICE—TIMBER LAND APPLICATION.

DEUEL *v.* BORSETH.

Notice of a settlement claim, posted conspicuously on the land, is sufficient to protect the claim against one who subsequently makes application for a portion thereof under the timber and stone act, whether the timber-land applicant has actual notice of the settlement claim or not, provided the posted notice was of such character that it might have been seen by a reasonable exercise of diligence.

Notice of a settlement claim, posted on a subdivision thereof *outside* of the technical quarter-section on which the improvements are located, will protect the settler's claim to such subdivision as against the claim of one who subsequently makes application therefor under the timber and stone act.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 23, 1905.* (J. L. McC.)

Henry Borseth, on September 19, 1902, filed timber-land application for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 3, T. 30 N., R. 15 W., Seattle land district, Washington, and published notice of his intention to make proof upon said entry on March 16, 1903.

On December 2, 1902, John N. Deuel filed protest against the allowance of proof by Borseth, alleging that he had settled upon said land, together with other land, described as the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the same section, on August 3, 1901, and that he was so residing at the time Borseth made his filing.

Borseth offered proof as advertised, showing clearly that the land was of the character that could properly be entered as timber-land.

A hearing on Deuel's protest was set for January 7, 1904. On January 2, 1904, Borseth wrote to the local officers: "I will not be at the land office, to the hearing on the protest against my timber-

claim; I leave the matter for the land office to decide." In fact he did not appear. Deuel did; and his attorney moved that default be entered against Borseth, which was done. Testimony was submitted by Deuel and several witnesses in his behalf.

As the result of said hearing, the local officers found that the contestant had shown his superior right, by virtue of improvement, cultivation, and residence, and recommended that Borseth's timber-land application and the proof submitted thereunder be rejected.

Borseth appealed. Your office, on February 24, 1905, rendered a decision reversing the judgment of the local officers, and finding and holding that the plaintiff had not made such a showing as to residence, improvements, and cultivation as would defeat the Borseth claim under the timber-land law.

From this action counsel for the contestant has filed an appeal.

Before dealing with the questions raised by the appeal, it is indispensable to a correct understanding of the case to set forth the status of the several forty-acre tracts embraced in Deuel's homestead claim.

The tract in controversy—the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 3—was in no way encumbered prior to Borseth's application to enter the same under the timber-land act.

The remaining tracts were covered by the Olympia Forest Reservation, State of Washington, by proclamation of February 22, 1897, act of June 4, 1897 (30 Stat., 34, 36). These three "forties," however, were eliminated from said reservation April 7, 1900; but, having been sold and patented, were reconveyed to the government.

The NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ was reconveyed by Charles Wright, on November 22, 1899, and lien land selected, which selection was approved by your office April 20, 1904. On this date it became subject to entry.

The NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ were reconveyed by Jennie V. Hayes, on January 22, 1900, and lien lands selected, which selections were approved May 23, 1903. On this date they became subject to entry.

Deuel alleges that he was residing upon and cultivating "said lands" since August 3, 1901, with the intention of entering the same; that he might at any time have made entry of the "forty" here in controversy, but by so doing would have exhausted his homestead right; and he points out that in case he is debarred from entering said land in controversy the remainder of his claim will be left non-contiguous, so that the most he can enter would be eighty acres.

The appeal alleges that it was error on the part of your office, "not to find that said Deuel was a homestead claimant to the land herein, together with other lands, and at the time of the timber-land application of Borseth was occupying, cultivating, and improving the same."

Here we strike an ambiguity: does "the same" refer to the forty

acres in controversy, or to that, "together with other lands?" A similar ambiguity appears in the finding of the local officers:

A careful consideration of the testimony herein submitted shows that, long prior to the filing of the timber-land application of said Borseth, the homestead claimant herein established an actual, *bona fide* residence on the land claimed by him under the homestead laws—to wit, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the N. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of above said section.

There is abundant evidence to prove that there are improvements, consisting of a house, etc., to the value of at least a thousand dollars, "on the land." But the evidence does not show on which of the "forties" the house and other improvements are. It is certainly not shown that any of them are upon the "forty" here in controversy. Borseth's timber-land proof says there are no improvements thereon.

The appeal alleges that notice of Deuel's claim had been given by notices posted on the tract in controversy; and that his claim to the land involved "was open and notorious, and known to said Borseth at the time he made his timber-land application."

There is abundant evidence that notice of Deuel's claim was posted conspicuously on the land in controversy. Witness Wischmeyer testifies:

There was a notice on the northwest corner of this disputed forty, on a hemlock tree, right close to the road or trail; the hemlock tree was cut out, may be five feet or more from the ground, and there was a paper notice on it: "I hereby claim as a soldier's homestead." It was signed by Mr. Deuel, and by Krull and Smith. It was written on the tree also. I have seen it a hundred times, I guess. . . . Yes, you couldn't help seeing the notice, unless you would look the other way. You have got to make a turn right there, at the creek, and have got to cross the creek, and you can't help seeing it.

E. W. Shattuck's testimony concludes as follows:

Q. Isn't it a matter of fact, Mr. Shattuck, that any one making a careful examination of this especial forty must have seen Mr. Deuel's notice?—A. Couldn't help it.

F. H. Krull's testimony runs thus:

Q. As to the forty in dispute, on what part of it did Mr. Deuel post notice?—A. The northeast part, right in plain view of the county road; right on the road.

Q. Did you witness that notice also?—A. Yes, sir.

Q. What kind of a tree was that notice put on?—A. It was about ten inches in diameter, hewed off smooth on one side, and a notice tacked up there; and also written on the wood itself with an indelible pencil.

Q. State whether or not that notice was in plain view of any one passing on this county road or trail?—A. Yes, sir, it was.

Other witnesses testify to the same effect.

The testimony (as hereinbefore stated) fails to show on which particular forty Deuel's house and improvements were. If they had been shown to be upon the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ —in the same quarter—

section with the forty in controversy—the question here in issue might easily have been settled, inasmuch as notice given by residence and improvements upon one portion of a quarter-section extends to the entire quarter-section as defined by the public survey. But in view of the uncertainty upon this point, it becomes necessary to inquire further.

While there is no positive testimony bringing home to Borseth individually a knowledge that Deuel was claiming the forty acres in controversy, there is a very strong probability that such was the fact. Witness Byron testifies:

Q. Did you ever have a talk with Mr. Borseth about his claim to this forty?—

A. I had a talk with Mr. Burton, who located him.

Q. Was it in reference to this particular forty?—A. In reference to this forty: he told me—Burton did—that he was going to get Borseth to take that forty, if he could; he didn't want the old man in there next to him.

Q. Who did he mean by the old man?—A. Mr. Deuel.

Q. Mr. Byron, is it not the fact that Mr. Deuel's homestead claim to this forty . . . has been open, notorious, and well recognized by settlers in that county since 1901?—A. It was, certainly; I think it is considered the best residence in there.

This testimony does not prove conclusively that Borseth knew of Deuel's claim, though it indicates that such was very probably the fact. It will not be necessary, however, to bring such knowledge home to Borseth with absolute certainty, in order to arrive at a conclusion.

In the case of *Smith v. Johnson et al.* (17 L. D., 454), Smith made application to enter the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of a certain section 7, in the Ashland land district, Wisconsin. His application was denied because of Johnson's prior homestead entry of the entire NW. $\frac{1}{4}$ of Sec. 7. Smith proved prior settlement on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. He had made no settlement on the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$. He proved, however, that he had placed written notices conspicuously on said S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$. Thereupon the Department held (see syllabus):

Notices defining the extent of a settlement claim, posted in conspicuous places thereon, are sufficient to protect such claim as against subsequent settlers; and it is immaterial in such case whether the later settler has actual notice or not, if the posted notices are of such character that they might have been seen by a reasonable exercise of diligence.

The Department again held, in very clear and emphatic language, in the case of *Driscoll et al. v. Doherty et al.* (25 L. D., 420, syllabus):

Notices defining the extent of a settlement claim, posted on subdivisions thereof *outside* of the technical quarter section on which the improvements are placed, will protect such claim as against subsequent settlers.

The cases above quoted from (i. e., *Smith v. Johnson et al.*, and *Driscoll et al. v. Doherty et al.*) are cited with approval in the depart-

mental decision in the case of *Warren v. Gibson* (29 L. D., 197). In each of the cases named the opposing parties were claimants under the homestead law; but the ruling enunciated is equally applicable in the case here under consideration, where one of the parties is a claimant under the timber-land law. The case must be decided in accordance with the principles hereinbefore set forth.

The action of your office in awarding to Borseth the right to make timber-land entry of the tract in controversy is reversed; and Deuel will be allowed to make homestead entry of the entire one hundred and sixty acre tract described in his application, unless some other reason to the contrary shall appear.

INDIAN LANDS—SELECTION—TOWNSITE.

TURNBULL v. ROOSEVELT TOWNSITE.

No rights could be acquired by settlement upon lands within the ceded limits of the Red Lake Indian reservation, with a view to making homestead entry thereof, prior to the opening of said lands to settlement and entry.

In view of the provisions of the act of February 9, 1903, which extended the townsite laws to the lands within the ceded limits of the Red Lake Indian reservation and authorized their occupation for townsite purposes prior to formal opening thereof to disposition under the homestead laws, the occupation of a portion of said lands as a townsite prior to and on the date they were opened to settlement and entry, prevented the attachment of any rights on that date under a settlement with a view to acquiring title under the homestead laws, covering the same land, initiated prior to occupation of the land for townsite purposes.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 28, 1905.* (E. P.)

The land involved herein, namely, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 36, T. 162 N., R. 35 W., Crookston land district, Minnesota, is within the ceded limits of the Red Lake Indian Reservation, and, together with other tracts, was opened to settlement and entry November 10, 1903, under the provisions of the act of January 14, 1889 (25 Stat., 642), and pursuant to the notice issued by the Department September 22, 1903.

November 9, 1903, there was filed in the local office a paper in the nature of a townsite declaratory statement, signed by A. J. Hamilton, Elof Swanson, John Butterfield, John Carlson, G. Myers and T. Knutson, and verified under oath by all of the persons named except Carlson. Said informal townsite declaratory statement reads as follows:

NOTICE.

To the Register and Receiver of the U. S. Office, Crookston, Minn.

The undersigned represent that they are now occupying for business and residence purposes certain tracts of land within the SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of Section 36, Township 162 N., Range 35 W., as shown by a plat of the same hereto attached.

That on or about October, 1900, the Minnesota and Manitoba Railway Company located a station, named Roosevelt, on said land; that a commodious station building, side track, post office, hotel, store buildings, warehouses and residences have been erected on said land and it is a prospective centre of population.

The undersigned give notice of their intention to gain title under the U. S. townsite laws to the several tracts of land shown on said plat, as provided in sections 2382, 2383, 2384 and 2385 of the Revised Statutes of the U. S., and request that the said SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Section 36, T. 162, R. 35, a government subdivision of forty acres, be reserved for townsite purposes, and that homestead entries on said land be rejected.

Attached to said paper was an informal plat showing the approximate location of a railroad station, a post office building and six other buildings used for townsite purposes.

Said townsite declaratory statement was in due time transmitted by the local officers to your office for consideration, and, by letter of January 14, 1904, your office advised the local officers that the paper filed by the townsite claimants was not in the required form for the entry of land for townsite purposes under sections 2382 to 2386, inclusive, of the Revised Statutes, and the regulations issued thereunder, and directed them to notify the applicants that they must proceed in accordance with the laws and regulations set forth in the departmental townsite circular. Although duly served with notice of your said office decision, nothing further appears to have been done by the townsite claimants towards acquiring title to said land under the townsite laws; other than to file in your office, March 15, 1905, a petition, praying that the tract be platted and disposed of under the provisions of sections 2382 and 2384 of the Revised Statutes.

November 10, 1903, Peter Turnbull presented at the local office an application to make homestead entry of the land above described, together with other land, upon which application action was suspended by the local officers pending disposition of the townsite application. June 1, 1904, he filed in the local office an affidavit and petition, executed by himself, which reads as follows:

That he is the identical person who, on November 10, 1903, presented to the Register and Receiver of the Crookston land office, Minnesota, his application to make homestead entry for the E. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 162 N., R. 35 W., 5th P. M.; that he was informed at that time by the Register of said land office that a petition of townsite entry for a part of said tract, viz: SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, had been filed on the day before, but that said petition was in some respect defective and had been or would be forwarded to the Commissioner of the General Land Office for his consideration; that his (affiant's) entry application would be received, held and suspended at said Crookston land office, without detriment to his interests or prejudice to his rights, pending the consideration of said townsite petition; that he is informed, though he has not been formally or officially notified of the fact, that by letter of January 13, 1904, the Commissioner of the General Land Office notified the said Crookston

land office that said townsite petition was not in such form as to constitute a legal application for townsite filing or entry, but would be treated as notice that the land embraced or described therein was claimed for townsite purposes and, as such, reserved from homestead entry, reasonable time being allowed for the perfectment of townsite application; that, although more than four months have passed since the date of the said General Land Office letter, no legal or formal townsite filing or entry application has been presented. Affiant asks, therefore, that there shall be no further delay in the matter of his homestead entry application; and that said application may be immediately allowed, and he hereby asserts a right to said land superior to any that might or could be lawfully claimed under the townsite or other laws, which right he acquired by actual settlement upon and improvement of the tract prior to the coming thereon of any other person or persons, especially those in whose behalf the said townsite petition has been presented. He alleges, in support of his claim to priority and superiority of right, that said land is a part of the former Red Lake Indian Reservation the title to which became fully vested in the United States by virtue of treaty made pursuant to the act of Congress approved January 14, 1889 (commonly called the Nelson Act); that, inasmuch as it is agricultural land within the meaning of said act, it has been lawfully subject to settlement ever since the consummation of said treaty; that because of the claim of the State of Minnesota, under its school grant, which has been declared invalid by the United States Supreme Court, said tract was not proclaimed as open to actual entry and so opened until November 10, 1903, but there was not, at the date of affiant's settlement thereon, and never has been any lawful inhibition against settlement upon and acquirement of right thereto under the settlement laws of the United States; that he made actual *bona fide* settlement upon the said tract in May, 1901, and established residence thereon with his family, in good faith, with the intention of making his permanent future home thereon, and that, there was at that time no other person or persons residing upon said land, or any part thereof, claiming a right thereto under the settlement laws or otherwise; that he has continuously resided upon and improved said land ever since the date of his original settlement and made it his home to the exclusion of a home elsewhere, and has always intended to enter it as a homestead whenever he might be lawfully permitted so to do; that he presented his entry application as soon as it was possible to do so after the land was officially declared to be subject to disposal; that he acquired a lawful right to and interest in said land, by virtue of the settlement laws, immediately upon making settlement thereon, which right is superior to any that might or could be asserted under any law by any one who may have subsequently gone upon said tract. Affiant further states that when said land was declared to be subject to entry and disposal there were residing upon the same, temporarily and otherwise, seventeen persons exclusive of himself and family, viz:—Elof Swanson and family, 3 persons; John Carlson and wife, 2 persons; A. J. Hamilton and son, 2 persons, John Butterfield and family, 10 persons, all of whom came to reside there subsequent to the settlement upon the land by this affiant; that affiant, although then claiming the land, having no actual entry of record, was powerless to prevent the intrusion of others upon the premises, and, as a right of way under special act of Congress had been granted across said land to the Minnesota and Manitoba (now Canadian Northern) Railway, he deemed it useless to make effort to do so. Affiant believed himself to be lawfully entitled to said described land under the provisions of the homestead laws, and, therefore, he presents his petition praying for the protection of his rights and property, and the immediate allowance of his pending homestead entry application.

December 15, 1904, Turnbull filed in the local office a petition praying that the notice of intention to make application for townsite entry be rejected and that the petitioner's application to make homestead entry be allowed, for the following reasons:

1. They have not filed, nor caused to be filed with the register of deeds (recorder) for the county within which the land is situated any plat, map or diagram of the alleged townsite with statement of facts, as required by Section 2382 of the Revised Statutes of the United States.

2. They have not filed in the General Land Office a verified transcript of any such plat, map or diagram and statement, with testimony of witnesses relative to the establishment of the alleged town in good faith, as the law requires; nor have they filed such plat, map or diagram, statement and testimony in the district land office having jurisdiction over the land applied for.

3. Within less than three months from the date of the filing of the so-called declaration, that is to say, on January 13, 1904, the Commissioner of the General Land Office decided that the papers then presented were not such as the law requires in townsite applications and that they were insufficient for the purposes intended and required the parties to comply with legal requirements within a reasonable time. The parties were duly notified January 20, 1904, of the said decision and requirement made by the Commissioner, but they have never made any attempt to comply with the requirement or to cure the defects in said papers. On November 7, 1904, one A. J. Harwood, a United States Commissioner for the District of Minnesota, through whom all the correspondence relating to the alleged townsite claim has been conducted, forwarded a letter to the Commissioner of the General Land Office, calling attention to the fact that more than a year had elapsed since the alleged founding of the town and that the law had not been complied with by the parties in respect to the filing of map, statement, testimony, etc., and requesting, in view of such failure, that the Secretary of the Interior shall proceed with respect to said town as provided by Section 2384 of the United States Revised Statutes, thus waiving, in behalf of said parties to said so-called declaration any right which might have been acquired thereunder, and any and all claim to intention to make townsite entry as alleged therein.

4. To refuse to grant the request and prayer of this petitioner will unnecessarily impose upon the petitioner the hardship and burden of expense and trouble of a contest, and longer deprive him of the rights and privileges to which he is entitled under his settlement made in May, 1901, and his homestead entry application presented November 10, 1903, the day the lands were opened to disposal under the act of January, 1889 (the Nelson law) and acts amendatory thereto.

The petition was denied by your office decision of January 14, 1905, it being held (1) that public land that is used and occupied for purposes of trade and business, whether application to make townsite entry of the same be made or not, is not subject to homestead entry; (2) that the said townsite declaratory statement, while informal, was nevertheless sufficient in form and substance to segregate the land until canceled upon a contest or other proper proceeding; (3) that the failure of the townsite claimants to proceed under sections 2382 to 2386, inclusive, of the Revised Statutes, did not

amount to a waiver or relinquishment by them of any rights they might have acquired, and that while the said claimants had been notified that they must proceed in accordance with the laws and regulations, no penalty, other than that prescribed by section 2384, could properly be imposed as a consequence of their failure to so proceed within a given time; and (4) that the question as to whether Turnbull acquired any rights superior to those of the townsite claimants by virtue of his alleged prior settlement was one that could be determined after a hearing.

March 21, 1905, Turnbull filed in your office a petition, based on the allegations contained in the affidavit filed by him in the local office June 1, 1904, and the petition filed by him in your office December 15, 1904, both hereinabove set forth, it being contended by him that he is entitled to make homestead entry of the land because of his alleged prior homestead settlement, notwithstanding the alleged occupancy thereof for townsite purposes at the time his application to enter was presented.

In passing upon said petition for a hearing your office, by decision of April 13, 1905, held (1) that, in view of the departmental order of August 1, 1899, prohibiting all persons from going upon any of the ceded Chippewa lands, except those within the Red Lake reservation that had been theretofore opened to settlement or offered for sale, Turnbull acquired no rights whatever by virtue of his alleged settlement made upon the land in question prior to November 10, 1903; (2) that under the provisions of the act of February 9, 1903 (32 Stat., 820), said land became subject to townsite settlement and entry from and after the date of the approval of said act; (3) that in view of the fact that Turnbull fails to allege in his affidavit that on November 10, 1903, the land was unoccupied by anyone save himself, but, on the contrary, admits that it was in fact at that time occupied by seventeen persons, exclusive of himself and family, and does not attempt to dispute the sworn statement of the townsite claimants to the effect that on November 10, 1903, the land was occupied for townsite purposes, his affidavit fails to state a cause of action; and (4) that inasmuch as said land was segregated by the townsite declaratory statement or notice filed in the local office November 9, 1903, the local officers should have rejected Turnbull's application at the time it was presented, so far as it embraced the land in question, instead of suspending it. The petition for a hearing was therefore denied, and Turnbull's application to make homestead entry of the tract in controversy was rejected.

From this decision Turnbull has appealed to the Department.

The act of January 14, 1889 (25 Stat., 642), after providing for the cession, survey and classification of lands within the Red Lake and other Chippewa Indian reservations in the State of Minnesota, and

the allotment of certain lands in said reservations to Indians, reads as follows:

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at St. Paul and Crookston, in the State of Minnesota, and at the expiration of thirty days the said agricultural lands so surveyed shall be disposed of by the United States to actual settlers only under the provisions of the homestead law.

Under the provisions of said act certain tracts within the ceded portion of the Red Lake reservation, the same having been previously surveyed, examined and ascertained to be agricultural lands, were on October 5, 1898, by departmental notice of August 12, 1898, opened to settlement and entry under the homestead laws. Included in the list of lands so opened was all of township 162 north, range 35 west, with the exception of sections 16 and 36 thereof, the tract herein involved being within the section last named. These sections, although they appear to have been at that time surveyed and examined, were not included in said list, for the reason that the State of Minnesota was then claiming them under the school land grant, which claim was not finally disposed of until the Supreme Court rendered its decision of May 2, 1902, in the case of *State of Minnesota v. Hitchcock* (185 U. S., 173), declaring that no land in the Red Lake reservation passed to the State under the school land grant.

August 1, 1899, the Department issued a circular or order which reads in part as follows:

The said act of January 14, 1889, provides for the disposal, after notice by advertisement for thirty days in the manner indicated therein, to actual settlers only, under the provisions of the homestead laws at the price and on the terms as to payment provided in the act of such lands as may have been determined in the manner indicated in the act to be agricultural. No lands in the . . . Red Lake . . . Reservation have ever been or will be open to sale or settlement by the United States under the homestead law or any other laws of the United States, until advertisement to that effect, as required by said act. . . .

Excepting the lands heretofore offered for sale or open to settlement upon the Red Lake Reservation and excepting those in said section 15 so as aforesaid ordered to be sold, there has been no appraisal or order for sale or for the opening to settlement, or for the advertisement of any lands whatever within any of said reservations.

All persons are, therefore, hereby warned not to go upon any of the lands within the limits of said reservations, except upon the lands within the Red Lake Reservation heretofore opened to settlement or offered for sale, for any purpose or with any intent whatsoever. No settlement or other rights can be secured upon said lands and all persons found unlawfully thereon will be dealt with as trespassers and intruders.

A copy of this order was, on August 2, 1899, forwarded by your office to the local officers at Crookston, Minnesota, with instructions to post the same in a conspicuous place in their office.

This order was, in effect, an executive order of withdrawal, and, if authorized, operated to prevent any person from acquiring any rights whatever, by virtue of attempted homestead settlement, in or to any of the lands covered by the order, that is to say, such of said ceded lands as had not been theretofore declared to be open to settlement and entry, until they should, by duly advertised notice, be opened to homestead settlement and entry. Said order was, however, in the opinion of the Department, modified by the act of February 9, 1903 (32 Stat., 820), which extended the townsite laws to the ceded Indian lands in Minnesota, the said act, by the express terms thereof, becoming effective from and after its passage.

Turnbull admits that the alleged acts of settlement relied upon by him were performed in direct violation and disregard of said order of August 1, 1899, but contends in his appeal that the land in question having then been surveyed, examined, and found to be agricultural land, the Department was without authority, under the act of January 14, 1889, *supra*, or any other law, to reserve it from settlement; he therefore insists that by his alleged settlement, although the same was made at a time when the land was not subject to entry, he acquired rights that were good as against all the world save the government, the State of Minnesota's claim to the land having been eliminated by the said decision of the Supreme Court, citing the case of *Kinman v. Appleby* (32 L. D., 526), and the cases therein cited.

In the case of *Wolsey v. Chapman* (101 U. S., 755, 768), the Supreme Court, referring to a withdrawal, by order of the Department, of certain lands in the State of Iowa, said:

The proper executive department of the government had determined that, because of doubts about the extent and operation of that act [of August 8, 1846], nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in the case of *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

In the case of *Riley v. Welles* (154 U. S., 578), the Supreme Court held that a certain settlement upon and possession of a tract within the limits of the executive withdrawal referred to in the case of *Wolsey v. Chapman*, *supra*, were "without right," and that the subsequent recognition by the land officers of such settlement and possession and the permission accorded the settler to make proof and entry under the pre-emption law "were acts in violation of law and void, as was also the issuing of the patent."

In view of the rulings of the Supreme Court in the two cases last above cited, the Department is of opinion that the order of August 1, 1899, was, as to the tract involved herein, an authoritative order of withdrawal, and that Turnbull acquired no rights whatever under the homestead law by virtue of any act of settlement that may have been performed by him prior to the time the said order was revoked by the advertisement of the notice of September 22, 1903, opening said tract to settlement and entry under the homestead laws. The Department has, it is true, held that although as against the government no rights can be acquired by virtue of a settlement made upon land while it is in a state of withdrawal or reservation, yet, where such tract subsequently becomes subject to entry and is claimed by two or more persons, each relying upon a settlement made during the period covered by the withdrawal or reservation, the question as to priority of settlement may be properly considered in determining the respective rights of the conflicting claimants. No orders, however, had ever been issued forbidding such settlement on the lands involved in those cases, whereas such settlement was specifically prohibited on the land here in question. Hence said cases have no application to a case like the one at bar.

Turnbull's right to make homestead entry of the land in question must therefore depend upon some act of settlement performed after 9 o'clock, a. m., of November 10, 1903, the hour that the same first became subject to homestead settlement and entry, or upon his application to enter, presented on that date. At that time, however, the land appears to have been occupied for townsite purposes, and a declaratory statement or notice showing such occupancy and evidencing an intent on the part of the occupants to claim the same under the townsite laws was then on file. This tract was, as hereinbefore stated, subject to townsite settlement and entry, from and after the passage of the act of February 9, 1903, and said informal townsite declaratory statement or notice, while insufficient as an application to enter the land under the townsite laws, was, in the opinion of the Department, *prima facie* evidence that the land was appropriated. The Department therefore holds that the same was not subject to homestead entry at the time Turnbull applied to enter it, and that his application was properly rejected by your office.

Turnbull, therefore, having acquired no right to the land either by virtue of his alleged settlement or his application to enter, is not entitled to a hearing for any purpose, except upon a contest regularly initiated.

The action appealed from is affirmed.

TOWNSITE ENTRY—MINERAL LAND—SECTION 16, ACT OF MARCH 3, 1891.

NOME AND SINOOK COMPANY ET AL. *v.* TOWNSITE OF NOME.

Under the provisions of section 16 of the act of March 3, 1891, townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, subject to existing rights under any valid mining claim or possession, lode or placer, held under existing law.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 29, 1905.* (G. N. B.)

August 5, 1904, Porter J. Coston, trustee for the townsite of Nome, Alaska, made entry for the townsite of Nome, amended survey No. 451, embracing 452.83 acres, Juneau, Alaska, land district, under the provisions of the act approved March 3, 1891 (26 Stat., 1095, 1099). The record shows that July 2, 1904, the day set therefor in the published and posted notice, townsite final proof was submitted. On that day the Nome and Sinook Company and R. T. Lyng filed separate and substantially similar protests, in which irregularities in the proceedings leading up to the entry are alleged, together with allegations to the effect that the land embraced in the townsite is mineral in character, and that the protestants are the owners of certain valid placer mining claims situated within the townsite. Counsel for the protestants cross-examined the final-proof witnesses but did not introduce evidence. On the day the entry was allowed, and without notice to the protestants, it appears, the protests were dismissed. The papers were forwarded by the local officers and considered by your office September 17, 1904. In your office decision it is stated that—

Inasmuch as this office cannot determine from the record whether notices of the dismissal of the original protests were regularly served upon the parties filing them, and whether they have acquiesced in that action, the allegations of all the papers will be here considered and disposition be made thereof.

Five protests were disposed of by your office decision, but only two are here on appeal. The allegations of the protests under consideration are fully stated in your office decision and need not be restated in detail. Your office held the protests for dismissal.

The protestants, the Nome and Sinook Company and R. T. Lyng, have appealed to the Department.

A careful examination of the record shows that the proceedings prior to entry were in substantial compliance with law, and in no way prejudicial to whatever rights the protestants may have in and to the land in controversy. The technical objections to the proceedings raised by the protests present no sufficient ground for rejecting the entry. It is further contended that the allegations that

the land embraced in the townsite is mineral in character, and that protestants are the owners of valid placer mining claims therein, located and held prior to the proceedings for townsite patent, are sufficient to warrant the Department in directing a hearing now to determine the facts. The action of the local officers in dismissing the protests without notice to protestants was irregular, but the allegations of the protest were considered by your office and have been again considered here.

The record and the records of your office show that October 3, 1900, a townsite committee filed with the surveyor-general of Alaska an application for the survey of the out-boundaries of the town of Nome, formerly called Anvil City. The application was dated June 28, 1899. At that time a population of 1,500 was claimed and improvements worth \$100,000 alleged. Beyond filing in the Surveyor-General's office a blue-print copy of a survey of the townsite, showing streets and alleys, blocks and lots, nothing was done toward securing a townsite patent at that time. The town was incorporated April 9, 1901. The town now has a population of about 5,000 during the open season, and about 3,000 throughout the year. The value of the improvements is now about \$800,000. The streets are graded, the business streets being planked; there are sidewalks and graded alleys; there is a fine water system, an electric light plant, a telephone system, and a fully-equipped fire department. The mining claims, for the most part, were located in January, 1899, and have not been systematically worked since that time.

Section 16 of the act of March 3, 1891, *supra*, provides:

That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

In the case of *Hulings v. Ward Townsite* (29 L. D., 21, 23), the Department said:

The townsite patent when issued will not, therefore, deprive the protestant or any other person, of any rights existing at the date of the townsite entry under any valid mining claim, or possession so recognized as aforesaid, within the patented area. All such rights are protected by the statute in terms. Nor

will the townsite patent deprive the Department of jurisdiction to issue patent for any such mining claim upon application therefor supported by proper proofs, for the reason that the statute also provides that patent may be issued to the possessor of any such mining claim after the townsite patent has been issued. All rights of mineral claimants existing at the date of the townsite entry being thus reserved and fully protected by the statute, there would seem to be no necessity for the segregation, prior to the issuance of the townsite patent, for the purpose of excluding the same from the patent, of any mining claims, surveyed or unsurveyed, for which applications had not been filed at the date of the townsite entry. All such claims, if subsisting and valid at the date aforesaid, may be carried to entry and patent, upon proper proofs showing that the mining laws have been complied with and that the claims are within the protection of the statute, notwithstanding the townsite entry and patent, provided only that such mineral entry and patent shall not embrace surface ground "where the owner or occupier of the surface ground shall have had possession of the same before the inception of title of the mineral-vein claimant."

See also *Lalande et al. v. Townsite of Saltese* (32 L. D., 211).

The law provides that under a townsite entry no title shall be acquired by the town or city to any *valid mining claim or possession held under existing law*, and is applicable to placer as well as to lode mining claims. (*Telluride Additional Townsite*, 33 L. D., 542.) There is no right that the protestants have in the land embraced in the townsite entry that can be affected by the issuance of townsite patent. A patent may be obtained by them for lands claimed, upon proper proceedings, and a showing that at the date of the townsite entry the lands were known to be valuable for minerals, and that such lands were possessed by them by virtue of a compliance with law, notwithstanding the issuance of townsite patent. The protestants, although they have seen the town grow upon lands claimed by them, have taken no steps to secure the paramount title. Until this is done, the Department does not feel justified in directing that a hearing now be had to determine questions that may in such event arise, especially as the law preserves to the protestants all rights they may have acquired under the mining laws prior to the townsite entry.

Since the date of your office decision protests have been filed by J. M. Bartholomew and J. S. Watts, in each of which the known mineral character of the land at the date of the townsite entry is alleged, and in which it is alleged the protestants are in possession of valid placer mining claims located within the out-boundaries of the townsite. These protests should be dismissed. Whatever rights the protestants have in and to the land in controversy are fully protected by law, and may be asserted and secured by proper proceedings.

The decision of your office is affirmed.

RAILROAD GRANT-INDEMNITY-ADJUSTMENT-ACT OF JULY 1, 1898.

JONES v. NORTHERN PACIFIC RY. CO.

The Northern Pacific Railway Company is the lawful successor in interest to the land-grant rights of the Northern Pacific Railroad Company.

The Northern Pacific Railway Company is entitled to indemnity for lands lost to the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company, on account of the prior grant of May 5, 1864, to the Lake Superior and Mississippi Railroad Company, between Thomson's Junction and Duluth.

A railroad indemnity selection, valid when made, under departmental order relieving the Northern Pacific Railroad Company from the designation of a particular loss as a basis for the selection, will not be avoided upon an allegation that a loss subsequently designated, in obedience to departmental order of August 4, 1885, was not the nearest available loss. Any requirement for the specification of a loss as a basis for an indemnity selection is only for departmental information and as an aid in the adjustment of the grant.

An application to purchase under the provisions of the act of June 3, 1878, presented prior to, but upon which proof and payment were not made until after, January 1, 1898, does not present a claim for adjustment under the provisions of the act of July 1, 1898.

Where an applicant to purchase under the provisions of the act of June 3, 1878, is allowed to make proof and payment in violation of an order withdrawing the land from entry, no claim is thereby initiated falling within the remedial provisions of the act of July 1, 1898.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 30, 1905.* (G. B. G.)

This is the appeal of Richard B. Jones from your office decision of December 2, 1901, holding for cancellation his cash entry allowed under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 54 N., R. 14 W., Duluth land district, Minnesota.

The land in controversy lies within the second indemnity limits of the grant made in aid of the construction of the Northern Pacific railroad east of the city of Duluth, provision for which is found in the joint resolution of May 31, 1870 (16 Stat., 378), and was selected by the Northern Pacific Railroad Company October 17, 1883. This selection remained of record until March 22, 1897, when it was canceled, pursuant to departmental decision in the case of Northern Pacific Railroad Company (23 L. D., 204), holding Duluth to be the eastern terminus of the company's grant, but was reinstated by your office letter of May 26, 1900, under the decision of the Supreme Court of the United States in the case of Doherty v. Northern Pacific Railway Company (177 U. S., 421), holding the eastern terminus of the grant to be at Ashland, Wisconsin. Between the date of cancellation

of the selection and before it had been reinstated, to wit, on December 17, 1897, the said Richard B. Jones applied to purchase the tract under the timber and stone acts, *supra*, and after due publication and proof made entry thereof, December 10, 1898. At the date of the purchase, but not at the date of the application, the tract in controversy, with others, was withdrawn from entry by virtue of departmental order of February 28, 1898 (26 L. D., 265), but there was a provision in the order permitting the completion of all entries theretofore allowed.

It is contended upon the appeal, in substance:

1. That the Northern Pacific Railway Company has no legal or equitable claim upon the United States to be considered the successor in interest to the land-grant rights of the Northern Pacific Railroad Company, and that there is therefore no authority of law for the patenting of lands to the first-named company.

2. That the company's selection was and is void, because no valid basis is assigned.

3. That the selection is irregular and void, because the selected land was not at date of selection the nearest available public land to the section alleged to have been lost in place.

4. That the timber and stone application of Jones having been presented at a time when the tract in controversy was unappropriated public domain, his application was the equivalent of an entry, and that he thereafter, in accordance with the terms of the order of suspension of February 28, 1898, *supra*, had the right to complete the same by making proof and payment thereon.

5. That such application having been presented, and such proof and payment having been made, he had prior to January 1, 1898, in contemplation of law and within the meaning of the act of July 1, 1898 (30 Stat., 597, 620), purchased the land directly from the United States, that he had an entry prior to January 1, 1898, within the meaning of departmental instructions of February 14, 1899 (28 L. D., 103), and that therefore he is entitled to an adjustment of his claim under said act.

The question of the successorship of the Northern Pacific Railway Company to the land-grant rights of the Northern Pacific Railroad Company was considered by Attorney-General Harmon, February 6, 1897 (21 Opinions, 486), and, referring to certain mortgage foreclosure proceedings, this Department was then advised that it should act upon applications for patents by the railway company upon the same considerations which should govern it in case there had been no foreclosure and the applications had been made by the old company.

It was but recently urged before this Department that said opinion was ill-advised and unsound, both in law and fact. The matter was

again submitted to the Attorney-General, and April 12, 1905, Attorney-General Moody considered the question, concluding as follows:

It seems to me that the decision of my predecessor was correct, and accordingly have to advise you [the Secretary of the Interior] that, in my opinion, you should continue to be governed by the rule there laid down.

This question is not therefore open for further consideration by this Department. *Hugh R. Ferguson v. Northern Pacific Railway Company* (33 L. D., 634).

Appellant's second contention, that the company's selection herein is void because of invalid basis, rests upon the allegation that the basis assigned lies within the overlapping limits of the grant to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior, made by the acts of May 5, 1864 (13 Stat., 64), and July 13, 1866 (14 Stat., 93), afterwards conferred by the State upon the Lake Superior and Mississippi Railroad Company, and the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat., 365), that Congress did not make a double grant within these overlapping limits, and that the date of the grant to the Lake Superior and Mississippi Railroad Company being prior to the grant to the Northern Pacific Railroad Company's road opposite the tract, and the tract having been approved to the former company prior to the definite location of the last-named company's road, it was not granted to it, and therefore not lost to that company's grant.

This contention is unsound. This base land is not within the limits of the withdrawal of May 26, 1864, made on account of the grant of May 5, 1864, and the case does not therefore fall within the ruling of this Department in the case of *Northern Pacific Railroad Company v. Rooney* (30 L. D., 403). It is true the base land was certified under the grant of May 5, 1864, but it was because of the fact that it fell within the indemnity limits of that grant as adjusted to the line of definite location, and was selected after the date of the Northern Pacific land grant, but prior to the definite location of that line of road. No question arises therefore in this case of the right of the Northern Pacific company to satisfy its loss from its second indemnity-belt where the base land was in law and fact lost prior to its grant of July 2, 1864. In the case of *Northern Pacific Railroad Company* (23 L. D., 204) it was held that because of a proviso in the act of July 2, 1864, *supra*, said company would not be entitled to receive indemnity for any of the losses sustained on account of the grant to the Lake Superior and Mississippi Railroad Company, made by the act of May 5, 1864, between Thomson's Junction and Duluth. This decision was fundamentally wrong. It held that, because of an agreement, amounting to a consolidation between the

two companies, whereby the Northern Pacific Company was authorized to use the other company's tracks between Thomson's Junction and Duluth, it thereby adopted this as its line of road between these points, that Duluth being on Lake Superior, the eastern point named in the company's charter, that point was therefore the eastern terminus of its grant, and that it therefore, between these points, being "upon the line of another railroad route to aid in the construction of which lands" had been theretofore granted by the United States, was, because of the proviso above referred to, not entitled to indemnity for lands lost because of the prior grant. This view was declared erroneous by the Supreme Court of the United States in the Doherty case, *supra*, which recognized the extension of the road eastward from Thomson's Junction to Ashland, Wisconsin, as part of the land-grant road, and it follows that, as the route of the Northern Pacific railroad is in no sense upon the same general line as that of the Lake Superior and Mississippi railroad, the proviso in question is without application, and the contention that the Northern Pacific company is not entitled to indemnity for this tract must fail.

With regard to the regularity of the indemnity selection of this land there can be no question but that, as originally presented, it was a proper selection under existing departmental regulations, the company at that time being relieved from the specification of a basis for its selections. It is claimed, however, that this selection should not receive departmental approval because there are, or were, at the time said selection was perfected by the assigning of a basis in 1893, available lands nearer to the loss then specified; and the question is therefore presented, whether, admitting the same to be true, the selection is a proper one under the terms of the granting act.

The third, or granting, section of the act of July 2, 1864, *supra*, grants to the Northern Pacific Railroad Company—

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

December 7, 1887, the question as to whether selections could be made within the first indemnity belt of the Northern Pacific land-

grant for losses outside the particular State or Territory in which the same occurred, was submitted to the Attorney-General for opinion, and in consideration thereof Mr. Attorney-General Garland, in his opinion dated January 17, 1888 (8 L. D., 14, 17), after referring to the clause of the section above quoted providing for indemnity, says:

The conditions of this indemnity, set forth in detail, under which the right or privileges of selection rests in the company, are, lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; those selections must be made under the direction of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than ten miles beyond the limits of the granted sections. These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same State or Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction.

It is further provided by said section 3 of the act of 1864:

That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided.

It will be noted that this provision limits the selection of indemnity for losses to the grant on account of mineral lands, to "odd numbered sections, nearest to the line of said road," etc.

There could be no good reason for attaching an additional condition upon selections made in lieu of lands lost to the grant because mineral in character, and it might therefore be urged that it was intended to enlarge the limits within which such selections could be made. Thus, for general indemnity, selections were to be made from "alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," being the granted sections, and for losses on account of mineral lands, to "odd numbered sections, nearest to the line of said road."

Be this as it may, the lands made the basis for the selection in question were not lost to the grant because mineral in character, and the limitation "nearest to the line of said road," differs widely from a requirement that the selection must be nearest the tract lost and made the basis for the selection.

In the case of the *United States v. Colton Marble and Lime Company* (146 U. S., 615, 618) it was said by the court:

It might well be assumed that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. That right of selection was a

prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts.

In that case the court had under consideration the prospective right of the Atlantic and Pacific Railroad Company to odd numbered sections within the indemnity limits of its grant, made by act of July 27, 1866 (14 Stat., 292), which grant has the same indemnity provisions as the Northern Pacific act of 1864, with the exception that indemnity for losses to the grant on account of mineral lands is limited to "odd numbered sections nearest to the line of said road and within twenty miles thereof." With regard to this latter provision it will be noticed that the selection is limited to odd numbered sections within the primary limits of the grant, as those limits are twenty miles on each side of the road in States and forty miles on each side of the road in Territories, thus, in effect, nullifying the provision, because the sections from which selections are to be made were specifically granted in place.

The resolution of May 31, 1870, *supra*, providing for a second indemnity belt to the Northern Pacific grant, before quoted from, merely limits the place of selection to a belt "ten miles on each side of said road, beyond the limits prescribed in said charter," etc.

The act of 1864 and the resolution of 1870 each therefore established a limit beyond which the company can not go in making its general indemnity selections, but in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occur, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the granting acts.

That the right of selection conferred by these acts can not be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. He should see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections, equally within the descriptions contained therein, he can not say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection. See *Willamette Valley and Cascade Mountain Wagon Road Co. v. Bruner* (26 L. D., 357).

Attention has been called to the circular of August 4, 1885 (4 L. D., 90), relating to railroad indemnity selections and requiring a designa-

tion of a loss as a basis for all indemnity selections, in which circular it is said that:

Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land within proper sections and limits nearest the granted section in which the loss occurred.

This circular was issued before the opinion of the Attorney-General or the decision of the court referred to. Its main purpose was to require the specification of a loss as a basis for the selection, thereby aiding the adjustment of the grant, for it required the designation of a loss as a basis for all selections previously approved and certified as well as for those then pending or thereafter to be made.

In respect to the portion of said circular above quoted, in the matter of proximity between loss and selected tract, in view of what has been said, it can not be considered as a limitation upon the right of selection, but rather as suggesting a manner of designating the losses so as to aid in adjusting the grant. It might also be stated that it is learned upon inquiry at your office that, at least as to lands within the second indemnity belt, a strict adherence thereto has not been enforced.

In the case of William Hickey (26 L. D., 621) it was held (syllabus):

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable.

The conclusions hereinbefore reached answer appellant's fourth contention. The railway company's selection was improperly canceled; the application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the land department, unless it is protected by the provisions of the act of July 1, 1898, *supra*, and this question involves consideration of the fifth and last specification of error on appeal.

If Jones had purchased this land from the United States prior to January 1, 1898, or if he had prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjustment thereunder. It is believed that he had done neither of these things. While the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase until the money was paid. There was therefore no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application. While such an application, if presented in accordance with law and for land subject thereto, reserves the land from other disposition by the land

department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. Board of Control, Canal No. 3, State of Colorado, *v. Torrence* (32 L. D., 472). This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase by Jones, allowed in violation of that order, initiated no right falling within the remedial provisions of the act of July 1, 1898. *F. W. Eaton and A. F. Huntoon v. Northern Pacific Railway Company* (33 L. D., 426).

The decision appealed from is affirmed.

TIMBER CUTTING—RESIDENTS—DOMESTIC PURPOSES—SECTION 8, ACT OF MARCH 3, 1891.

CITY AND COUNTY OF BEAVER.

Cities and counties are "residents" of the State in which they are located, within the meaning of that term as used in section 8 of the act of March 3, 1891, as amended, conferring upon the residents of certain States and Territories authority to cut timber on the public lands for agricultural, mining, manufacturing, or domestic purposes.

Timber used by cities for constructing electric-light plants and building bridges, and by counties for building bridges and constructing flumes across the county roads, is used for "domestic purposes" within the meaning of section 8 of the act of March 3, 1891, as amended.

Assistant Attorney-General Campbell to the Secretary of the Interior,
August 31, 1905. (E. F. B.)

A letter from the Commissioner of the General Land Office recommending that an application filed by Beaver City, the County of Beaver, and others residing in the State of Utah, for permit to cut and remove timber from the public lands under the 8th section of the act of March 3, 1891, as amended (26 Stat., 1093), has been referred to me for opinion "as to whether or not the within application can be granted as to the thirty thousand feet and four thousand feet of timber desired by the City and County of Beaver, Utah, respectively."

Said section, as amended, permits the cutting of timber from the non-mineral public lands in the States of Utah and other States and Territories named therein, "by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior," for use in such State.

The only question involved in this reference is whether the City of Beaver and the County of Beaver are residents of said State within

the meaning of the act and whether the timber is to be used for the purposes contemplated by the act.

The City of Beaver and the County of Beaver are aggregations of residents of said State and a permit for the taking of timber from the public lands to be used by such residents collectively for their common benefit comes as well within the purview of the act as a permit to such residents as individuals. The applicants are therefore within the meaning of the act "residents" of said State and as such are entitled to the benefits of the act.

The uses for which the timber is to be applied by the City of Beaver are for an electric-light plant and for bridges. The timber applied for by the County of Beaver is to be used for building bridges, and constructing flumes across the county roads.

In an opinion submitted August 18, 1905 (34 L. D., 78), as to whether a permit can be granted under the act of March 3, 1891, for smelting purposes, it was said that this act must be construed in *pari materia* with the act of June 3, 1878 (20 Stat., 88), and the acts of June 4, 1897 (30 Stat., 11, 36), and July 1, 1898 (30 Stat., 597, 618), authorizing the free use of timber on public lands, which have the same general scope, purpose and limitation, differing only as to the character and locality of the land from which the timber is taken.

The specific uses enumerated in the several acts may be considered as a whole to aid in interpreting the full scope and meaning of the words "or domestic purposes" as they occur in one, and "other domestic purposes" as they occur in the other acts. Besides, the act of June 3, 1878, has received an interpretation by the Supreme Court in the case of *United States v. United Verde Copper Co.* (196 U. S., 207), as to the uses for which timber may be taken, giving to the general clause "other domestic purposes" such operation as to include uses relating to those specifically designated. Speaking of the operation of the word "domestic" in its association with the word "other" the court says:

It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word "domestic" applies to the locality in which the statute is directed, and gives permission to the industries there practiced to use the public timber.

The regulation governing the granting of permits under the act of March 3, 1891, specify the purposes for which the timber may be used. They are, "firewood, fencing, building, or other agricultural, mining, manufacturing or domestic purposes."

The use of timber for the building of an electric power plant is expressly authorized by the regulations and is such a use as comes

clearly within the purview of the statute. The building of bridges and the construction of flumes across the public roads is a use equally contemplated under the general clause "other domestic purposes."

I have therefore to advise you that the permit may be granted to these applicants for the uses specified in their applications.

Approved:

THOS. RYAN, *Acting Secretary.*

SECOND HOMESTEAD ENTRIES—SECTION 3, ACT OF JUNE 5, 1900, AND
SECTION 1, ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 1, 1905.

*Registers and Receivers,
United States Land Offices.*

GENTLEMEN: Section 3 of the act of June 5, 1900 (31 Stat., 267), provides, in part:

That any person who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same, shall be entitled to the benefits of the homestead laws, as though such former entry had not been made.

Section 1 of the act of April 28, 1904 (33 Stat., 527), provides as follows:

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead law as though such former entry had not been made.

On June 26, 1905, in the case of *Peter G. Cox v. Levi F. Wells* (33 L. D., 657), the Secretary of the Interior held as follows:

That portion of the act of April 28, 1904, above set forth, like the third section of the act of June 5, 1900, relates to persons who had, prior to its passage, lost or forfeited their homestead entries, and were for either of said reasons unable to perfect the same. The act of 1904, however, imposes conditions or restrictions that were not imposed by the act of 1900, the earlier act providing merely that *any person* who had from any cause theretofore lost or forfeited his homestead entry, should be entitled to the benefits of the homestead law, as though such former entry had not been made, while the latter act requires such a person, in order to entitle himself to the benefit of the homestead law, regardless of his former entry, to show to the satisfaction of your office that he was unable to perfect such former entry on account of some unavoidable complica-

tion of his personal or business affairs or a mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law, and that he did not relinquish such entry or abandon the claim for a consideration. The Department is of the opinion that the effect of the act of April 28, 1904, is to modify the act of June 5, 1900, or place a limitation upon the operation thereof; and that all applications to make second homestead entry, filed subsequently to approval of the act of April 28, 1904, should be disposed of thereunder so far as the provisions of the same are applicable.

In view thereof, you will no longer allow entries to go of record as made under the third section of said act of June 5, 1900, but will transmit all applications for second entries to this office, together with the affidavit of the party, duly corroborated, showing his qualifications to make entry under the first section of the act of April 28, 1904, above cited.

The instructions issued under date of June 27, 1900 (30 L. D., 374), are modified accordingly.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner*.

Approved:

THOS. RYAN, *Acting Secretary*.

CONTEST—CHARGE—TIMBER AND STONE ACT—MINERAL LAND—SELECTION UNDER ACT OF JUNE 4, 1897.

JONES *v.* AZTEC LAND AND CATTLE COMPANY.

The fact that land is more valuable for the timber and stone thereon than for agricultural purposes does not exclude it from appropriation under the homestead laws, if not mineral in character, nor bar selection thereof under the provisions of the act of June 4, 1897.

The allegation in an affidavit of contest that land "is more valuable for the timber and stone," does not by necessary implication charge that the land is mineral in character and does not constitute a sufficient basis for a contest.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 6, 1905.* (J. R. W.)

Harry T. Jones appealed from your decision of March 14, 1905, denying a hearing and dismissing his affidavit to contest the selection under the act of June 4, 1897 (30 Stat., 36), of the Aztec Land and Cattle Company, Limited (hereinafter termed the company), for the NW. $\frac{1}{4}$, Sec. 34, T. 3 N., R. 83 W., Glenwood Springs, Colorado.

The company having theretofore filed its application under the act of 1897, *supra*, at a time not shown in the record, October 7,

1904, Harry T. Jones filed in the local office his duly corroborated affidavit for contest of the selection, alleging:

That the NW. $\frac{1}{4}$ of section 34 in township 3 N., R. 83 W. of the 6th P. M., is more valuable for the timber or stone contained thereon or therein than for agricultural purposes, and that such was the fact at the time that the contestee above named filed its lieu selection No. 9043 thereon, and that such was the fact at all times prior and subsequent hereto, and that the fact of said land being more valuable for the timber contained thereon or the stone contained therein than for agricultural purposes, was a thing notorious and patent and well known at the time of the filing of said lieu selection thereon and at all other times herein mentioned or referred to; and all of which this contestant now and here offers to prove at his own expense if he be accorded a hearing for that purpose, which he now prays.

This was transmitted by the local office, without action, to your office, which March 14, 1905, held that:

When the selection was filed there was no law or regulation which prohibited the selection of timber or stone land under the aforesaid act, and your action in allowing the lieu selection of the Aztec Land and Cattle Company, Limited, to be placed of record was proper and is affirmed. Jones's application for a hearing is denied and his affidavit of contest is dismissed, subject to his right of appeal.

The appeal alleges error in holding that land more valuable for its timber and stone than for agricultural purposes is not excluded from selection under the acts of June 4, 1897, *supra*, and June 6, 1900 (31 Stat., 614), and from settlement, entry, and patent under the homestead laws.

The record does not show when the selection was made, but by the reference to the act of June 6, 1900, it is implied that it was made after that date. By that act selections under the act of 1897, *supra*, were limited, or, in words of the statute, "confined to vacant, surveyed, non-mineral public lands which are subject to homestead entry." No question is made in the brief and argument but that the lands in question were vacant, were surveyed, and were non-mineral, so that the only questions presented are, whether they were "public lands which are subject to homestead entry," and whether the act of June 3, 1878 (20 Stat., 89), excludes land of the character therein described from settlement or homestead entry, and made them subject to private appropriation only under the act of 1878.

Prior to the act of 1878 any public lands not excepted by law because of their valuable mineral deposits, salt, etc., in general were not subject to disposal otherwise than under the pre-emption and homestead (or settlement) laws until after a public cash offering. The settlement laws imposed conditions of residence, improvement, and cultivation, compliance with which involved considerable expense and lapse of time before a title could be obtained. There were also many tracts that because of their rocky or heavily forested condition were left unentered under the settlement laws because unsuitable for

the homes of an agricultural resident population. In view of such facts, the law of 1878 (20 Stat., 89), applicable only to certain mountain States, afterward, August 4, 1892 (27 Stat., 348), made applicable to all the public land States, provided that lands—

valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold . . . at the minimum price of two dollars and fifty cents per acre, and lands chiefly valuable for stone may be sold on the same terms.

This act merely opened unoffered lands of this general description to private cash purchase in limited quantity, at an enhanced price, prior to its public offering. It was not the making of a new classification of lands that could be sold only under the act and only at the price fixed. Such lands, if not purchased under this act in advance of their public offering, upon being offered were subject to private cash entry or warrant location like any other public lands, not reserved from sale or entry. They became subject to settlement entry under the homestead law, the timbered or stony character and unfitness for cultivation being regarded merely as a circumstance to be considered in passing on the good faith of the settlement entryman. *John A. McKay* (8 L. D., 526); *Porter v. Throop* (6 L. D., 691); *Wright v. Larson* (7 L. D., 555); *Keller v. Bullington* (11 L. D., 140); *Harper v. Eiene* (26 L. D., 151).

It is thus clear that the mere fact that the land is more valuable for the timber or the stone therein does not exclude it from appropriation under lieu selection or homestead entry, if not of mineral character.

The affidavit does not directly nor by necessary implication charge that the land is mineral in character, but alleges in the alternative that it "is more valuable for the lumber or stone" than for agricultural purposes. It is entirely component with the truth of this averment that the stone adds nothing to its value and that it is desirable for its timber alone. A great variety of substances, valuable clays, gypsum, lime, stone, phosphate, guano, marble and slate, building stone, petroleum, etc., may render land of mineral character if the quality and market conditions make the land chiefly valuable for working such deposits with profit. *Dobbs Placer*, 1 L. D., 565, 567; *Phifer v. Heaton*, 27 L. D., 57; *Morrill v. Northern Pacific R. R. Co.*, 30 L. D., 475; *Florida Central etc., R. R. Co.*, 26 L. D., 600; *Richter v. Utah*, 27 L. D., 95; *Schrimpf et al v. Northern Pacific R. R. Co.*, 29 L. D., 327; *Beaudette v. Northern Pacific R. R. Co.*, 29 L. D., 248; *Tulare Oil & Refining Co. v. Southern Pacific R. R. Co.*, 29 L. D., 269. But to a mineral character the deposits must be workable at a profit above that for other purposes. *South Dakota Mining Co. v. McDonald*, 30 L. D., 357. It is "valuable" mineral deposits that give the

mineral character excepting land from homestead entry. Land not valuable for its mineral deposit is not excepted from homestead entry. The affidavit therefore was insufficient for the basis of a contest, as to the mineral character of the land, and it was subject to selection under the exchange provisions of the acts of 1897 and 1900, *supra*.

Your decision is affirmed.

FINAL PROOF—RESIDENCE—SECTION 2307 OF THE REVISED STATUTES.

MARY E. HAHN.

Where the final proof submitted on an entry made under section 2307 of the Revised Statutes shows that the entrywoman never established actual residence upon the land, although notified in accordance with the directions contained in departmental decision in the Anna Bowes case that if she desired to retain her entry she would be required to begin actual residence upon the land within six months from notice, such proof is insufficient and will be rejected; but where it appears that the proof was offered prior to the expiration of six months from the date of such notice, the entry should not be canceled unless it be first ascertained that she did not begin actual residence upon the land within the prescribed period.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 7, 1905.* (F. W. C.)

Mary E. Hahn has appealed from your office decision of August 5th, last, sustaining the action of the local officers in rejecting her proof proffered under her homestead entry made September 19, 1902, covering the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 22, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 27, T. 25 N., R. 42 W., Alliance land district, Nebraska.

The decision of your office, as well as the action of the local officers, was based upon the fact that claimant had never established an actual residence upon the land included in her homestead entry. In the case of Anna Bowes (32 L. D., 331) it was held that the widow or minor orphan children of a deceased soldier or sailor making homestead entry under section 2307 of the Revised Statutes must comply with the provisions of the homestead law as to residence and cultivation to the same extent as a soldier or sailor making entry under section 2304 of the Revised Statutes. The entry in question was made under the provisions of section 2307 of the Revised Statutes, claimant showing that she is the widow of Joseph Hahn, deceased, who was on the 20th of April, 1861, enlisted as a private in Company H, Sixth Regiment of Ohio Volunteer Infantry, and was mustered into the United States service as such for the period of three months on the 10th of May, 1861; that he was appointed a sergeant on the last named date and mustered out June 16, 1861, to

reenlist for a period of three years; that he was enlisted as a private of Company H of the Sixth Regiment of Ohio Volunteer Infantry on the 18th day of June, 1861, for a period of three years; and that he was transferred to the Veteran Reserve Corps November 15, 1864, by order of the War Department. In her proof claimant admits that she never established actual residence on the land covered by her entry and never built a habitable house thereon, that the only improvements made thereon consisted of about three-quarters of a mile of fencing, valued at \$75, and that she did no cultivation on the land, but gave parties the right to use it for grazing cattle, which seems to have been the only use made of the land since her entry. Departmental decision in the Bowes case, *supra*, directed that persons having uncompleted entries made under section 2307 be notified that if they desired to retain such entries they would be required to begin actual residence upon the land within six months from the issuance of such notice, or, if they so elected, they would be permitted to relinquish their entries without prejudice to their homestead rights, by giving notice of such election within the same time. From the report of the local officers, dated April 5, 1905, it appears that on November 30, 1904, claimant was advised that actual residence on her homestead entry was required, and also of her option to relinquish her land without prejudice to her homestead right, if she desired, and that registry return receipt, signed by her December 5, 1904, of such notice, is among the papers. She does not appear to have elected to relinquish her entry without prejudice to her homestead right, and does not appear to have begun actual residence upon the land, as required. Her proof was offered, however, March 14, 1905, before the expiration of six months from the date of the notice given her as required by the decision in the Bowes case. For the reasons given in the decision in the Bowes case, your office decision, rejecting the proof proffered by Mrs. Hahn, is affirmed. You will advise her hereof and institute inquiry to learn whether she has begun actual residence upon the land within the period prescribed in the departmental regulation heretofore referred to, and in event she has not, her entry will be cancelled.

LIEU SELECTION UNDER ACT OF JUNE 4, 1897—PENDING SCHOOL
INDEMNITY SELECTION.

SANTA FE PACIFIC RAILROAD COMPANY.

Pending disposition of a school-land indemnity selection, even though erroneously received, selection of the same land in lieu of a tract in a forest reserve relinquished under the exchange provisions of the act of June 4, 1897, should not be allowed.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 8, 1905.* (F. W. C.)

The Santa Fe Pacific Railroad Company has appealed from your office decision of December 13, 1904, rejecting its application, proffered under the act of June 4, 1897 (30 Stat., 36), to select lots 1 and 2 and the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 3, T. 28 N., R. 6 E., M. D. M., Susanville land district, California, in lieu of an equal quantity of land relinquished to the United States in the San Francisco Mountains forest reserve, because of certain prior school indemnity selections made of said lands; also, its application to contest the State's selection.

The selection in question was presented and rejected February 17, 1904. In the report of the local officers, dated June 8, 1904, it is stated that on March 16, 1904, H. D. Burroughs, as attorney in fact, filed a motion asking that the application be placed on file and held subject to any rights the State of California might have under its school land indemnity selection, and that on the same day the local officers notified him that the rejection of his application was "suspended and revoked pending consideration of the motion," and that on March 23, 1904, the local officers denied the motion and held "said application as rejected," from which action an appeal was taken upon the grounds: (1) in holding that the lands applied for were segregated by the State indemnity selection, and (2) that said indemnity selection was invalid and void for the reason that the lands used as a basis therefor "are not within a forest reserve, but are within temporary withdrawals and therefore do not constitute a lawful basis for State and indemnity selections."

At the time of the filing of this appeal there was also filed an affidavit, made by H. D. Burroughs, to contest the State's selection, alleging that the lands made the basis therefor "are not within a forest reserve, and are not such lands as entitle the said State to selection of other lands in lieu thereof, and do not constitute a lawful basis for the selection of public lands for said school lands."

Long prior to the filing of the application in question, to wit, on August 20, 1903, an application to select the lands here applied for, as school indemnity, had been filed in the local land office and accepted by the local officers on a base of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 36, T. 23 N., R. 16 E., and lot 4 and part of lot 3, Sec. 36, T. 22 N., R. 17 E., M. D. M., alleged to have been lost to the school grant by reason of inclusion in a forest reserve.

With regard to said base lands, the facts appear to be as follows: They were placed within a temporary withdrawal December 24, 1902, for examination and investigation with a view to their inclusion within a forest reserve, but on January 20, 1904, Sec. 36, T. 23 N., R.

16 E., was released from reservation and Sec. 36, T. 22 N., R. 17 E., was also released September 20, 1904.

By departmental decision of December 10, 1903, *ex parte* State of California (32 L. D., 346), it was held that the mere inclusion of sections 16 and 36, granted for school purposes, within a withdrawal made for the purpose of permitting investigation and examination of the lands with a view to their possible inclusion within a forest reservation does not place them within a "reservation" within the meaning of that term as employed in the act of February 28, 1891 (26 Stat., 796), and therefore does not afford a base for selection of indemnity lands. Thereafter the State filed a motion for review, asking that, should the motion be denied, the selections theretofore made on account of such bases might be permitted to stand until the question as to whether reserves should be created of the lands theretofore withdrawn, and, if so, to what extent, is determined, and February 13, 1904, the Department, in denying the motion for review, granted the State's request. This action was just four days prior to the presentation of the application here in question by the Santa Fe Pacific Railroad Company, and although, as before stated, it had been determined as early as January 20, 1904, that section 36, township 23 north, range 16 east, would not be included within a forest reserve, and on September 20, 1904, that the remaining tract made the basis of the selection in question would not be included within a forest reserve, final order was not made for the cancellation of the selection until March 18, 1905.

In the case of Santa Fe Pacific Railroad Company *v.* State of California, decided July 3, 1905 (34 L. D., 12), considering a similar application to select, filed by the Santa Fe Pacific Railroad Company, it was held that—

Good administration requires that pending the disposition of a selection, even though erroneously received, no other application including any portion of the land embraced in said selection should be accepted nor should any rights be considered as initiated by the tender of any such application.

This rule of administration has been followed for many years and the applicant was undoubtedly fully apprised thereof when tendering the application here in question. His motion, following the first rejection of his application, asking for suspension of action upon his application, or that the same be permitted to remain subject to rights under the State's selection, tends to establish such a knowledge on his part, and while it is true that your office should have canceled the State's selection as soon as it was determined that the base lands would not be needed, yet it must be held that the local officers correctly rejected the application here under consideration, when presented, because of the pending indemnity selection by the State. The appeal

by the applicant from such rejection entitled it only to a judgment as to the correctness of the action when taken.

With regard to the application to contest, nothing was alleged therein but what was fully disclosed by the records of your office and which had been fully considered and passed upon in the decisions hereinbefore referred to. There was no necessity for a hearing to develop these facts nor could any rights be considered as initiated by the filing of such application.

The action of your office in rejecting this application to contest, as well as that affirming the local officers in rejecting the application to select, is affirmed.

LIEU SELECTION UNDER ACT OF JUNE 4, 1897—CONFLICT WITH PRIOR APPLICATION.

AZTEC LAND AND CATTLE COMPANY.

Where a selection tendered under the exchange provisions of the act of June 4, 1897, is in conflict with a prior pending application, the selector should be apprised of the conflict and given opportunity to protect his rights by proper proceedings.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office; September 11, 1905.* (J. R. W.)

The Aztec Land and Cattle Company, Limited (hereinafter styled the company), appealed from your decision of March 9, 1905, rejecting its selection under the act of June 4, 1897 (30 Stat., 36), for 1,201.77 acres of land, including the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 5, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 8, T. 17 N., R. 4 E., B. M., Boise, Idaho, in lieu of 1,200 acres of land relinquished to the United States in the San Francisco Mountains forest reserve, Arizona.

March 10, 1904, at 9 A. M., William G. Cadby presented his timber and stone application to purchase the tracts above described under the act of June 3, 1878 (20 Stat., 89). On the same day, at 3:15 P. M., the company presented its application, not knowing, as it is said, anything of Cadby's application. The company's application was apparently in all respects regular, except that the affidavit that the base assigned had not been used for any prior selection bore date some months prior thereto. The local office rejected the company's application for that sole reason, not for conflict with Cadby's application. The company promptly, but after March 10, 1904, obtained and filed other affidavits to the fact required to be shown.

Your office held that these proofs were not of the substance of the application and might be furnished later, but rejected the company's

selection because of the conflict with Cadby's application as to one hundred and sixty acres of the land embraced therein. This ruling is assigned for error. It is claimed that the applicant should have been informed of the conflict and have been given opportunity to eliminate such land and to substitute other, so as to fill its selection and exhaust the base assigned.

The papers on their face show that no conflict of claims was intended by either of the parties, as Cadby's declaratory papers were dated at Meadows, Idaho, March 7, 1904, and were transmitted by mail. The company's selection was made and dated by its attorney in fact, March 9, 1904, and the accompanying affidavits as to the character and condition of the land selected are dated at Boise, Idaho, March 3, 1904. Each party was proceeding independently, Cadby presenting the first application. The selection, without fault or intent of the selector, was practically a partial one. The proper course in such case, in the interest of economical administration and just regard to the evident good faith of the second applicant, was that he should be informed of the conflict as to part of the land he selected and be given opportunity to eliminate such tracts. The local office erred in not so doing. Upon being advised of it, he was entitled to an election of three courses for protection of his rights: (1) He might abide his application and contest the right of the prior applicant. (2) He might ask to amend by eliminating the land in conflict, waiving the excess of base, and so save the remainder of his selection, if he deemed that to his advantage; (3) or eliminate the excess and so exhaust the base by selecting other land subject to such appropriation. William A. Orser, 33 L. D., 352. Your office erred in peremptorily rejecting the selection. Your decision is vacated, so far as it rejects the selection, and the case is remanded to your office for further proceedings appropriate thereto.

TIMBER AND STONE ACT—"LANDS CHIEFLY VALUABLE FOR STONE."

NARVER v. EASTMAN.

"Lands chiefly valuable for stone" are subject to entry under the act of June 3, 1878, regardless of whether or not the stone can, under existing conditions, considering the cost of quarrying and transportation, be marketed at a profit.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 11, 1905.* (D. C. H.)

The record shows that on May 25, 1903, George Eastman made his sworn statement under the act of June 3, 1878 (20 Stat., 89), for the purchase of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 14, T. 19 N., R. 37 E., Spokane Falls, Washington, land district, alleging the land to be

unfit for cultivation and chiefly valuable for its stone, and that on the same day notice of intention to submit proof in support of his said statement and application was issued and duly published. On June 2, 1903, Andrew F. Narver filed protest against the allowance of Eastman's said application setting forth "that at least one half of said tract is good agricultural land and good for grazing purposes and not such land as would be considered stone land," and on June 16, 1903, said Narver, as assignee of Harriet Jefferson, widow of Thomas Jefferson, filed soldiers' additional homestead application for the above described land, which said application was suspended and held to await action on the final proof of said Eastman, to be submitted in support of his aforesaid application for said land.

On the day fixed for the making of final proof, August 15, 1903, Eastman appeared and submitted proof. Narver also appeared and cross-examined Eastman and his witnesses and further testimony as to the character of the land was introduced by both parties.

The local officers found that the land is chiefly valuable for the stone therein contained and recommended that Narver's protest be dismissed and his application to make soldiers' additional homestead entry be rejected and that Eastman's final proof upon his timber and stone application be approved and cash certificate issued to him for said land.

Narver appealed to your office, where, on October 8, 1904, a decision was rendered reversing the action of the local officers and rejecting Eastman's application and final proof. The case is before the Department on the appeal of Eastman from your said decision.

The concurrent findings of the local office and of your office, to the effect that the land is unfit for agricultural or grazing purposes and that it contains large quantities of stone suitable for building culverts and for the foundations of houses, appear to be sustained by a preponderance of the evidence in the case.

The testimony shows that there are three large ledges of rock running through the land and a great deal of loose rock scattered over the tract, that the quantity of stone in the land is estimated at over two hundred and thirty four thousand perches, which in its present state is valued by a stone mason (the only witness who attempts to fix its value) at fifteen cents per perch, and that if the stone is taken from the land and sold in the nearest market, about 12 miles distant, it will bring from seventy five cents to one dollar per perch, and that the cost of transporting the stone to market will be \$4.00 or \$5.00 per perch. And it further appears from the testimony of one witness (the only one who fixes the price) that the cost of quarrying the stone will be about fifteen cents per perch.

The local officers and your office, while concurring in opinions as to the material facts in the case, differ in the conclusions arrived at, said

officers holding that the land is chiefly valuable for its stone and your office holding that, although the land contains large quantities of stone which may be utilized for building culverts and for the foundations of houses, yet the cost of quarrying the stone and putting it in market would so far exceed the price for which it could be sold as to leave the stone without any commercial value whatever. In other words, your decision seems to be based upon the theory that the commercial value of an article is the net profit it will yield over and above all costs of production and transportation to market.

The Department does not concur in this view. It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry, it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said that said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? And the same may be said as to the entry under this act of land valuable "chiefly for stone." Could not the land be valuable chiefly for stone even though, because of its remoteness from market of other causes, the stone could not then be sold for a remunerative price?

The statute does not say that the stone must be of a commercial value, or, as you construe that term, can be sold at a profit. The statute says, "lands chiefly valuable for stone." To adopt the construction you place upon the act requires the interpolation therein of a word so as to make it read as though Congress had said, "lands commercially valuable chiefly for stone," a thing not justified in view of the plain language used.

In the case of *Smith v. Buckley* (15 L. D., 321), the Department in effect held that, in determining whether land is subject to entry under the coal land law, the costs of transportation can not be taken into consideration as affecting the value of the coal shown to exist in the land; and no reason is seen why the same principle should not hold good and be applied in this case.

The real question to be determined in the case at bar is, whether the land involved herein is of such character that it can be entered under the act of June 3, 1878, known as the timber and stone act.

Evidently the statute has reference to the intrinsic value of the land because of its stone, and if the land be found to be thus valuable and the applicant be willing to invest his money therein, he should be allowed to make entry thereof, regardless of the question as to whether the investment will prove to be profitable or not.

In the case of the *United States v. Budd* (144 U. S., 154, 167), it was held that the said statute of June 3, 1878, does not refer to the probabilities of the future, but deals with the facts as they exist at the time the application to purchase the land is made and the proof in support thereof is submitted. See also *Gilmore v. Simpson* (16 L. D., 546).

In the case at bar, under the statute and Eastman's application, the chief value of the land must be the stone contained therein, and if the stone has a distinct value and is found in large ledges running through the land and is scattered over it in such quantities and in such manner as to render the tract in its present state unfit for cultivation, the land belongs to the class contemplated by the statute and should be entered thereunder.

The evidence in this case showing by a clear preponderance that the land in question is unfit for cultivation, and that the stone in its present state has a specific value, the said land is of the character contemplated by the act of June 3, 1878, *supra*, and comes within its scope and meaning.

The decision appealed from is accordingly reversed, Narver's protest will be dismissed and Eastman's application and final proof approved. Since the case has been pending here on appeal, Narver has filed a virtual withdrawal of his protest against the application of Eastman to purchase the land in question and has asked that his appeal to your office from the action of the local office rejecting his said protest be dismissed, but, as the appeal has already been considered and passed upon by your office, the said request can have no effect or bearing upon the case. Narver has also, since the case has been here on appeal, requested that he be allowed to withdraw his soldiers' additional homestead application for the said land and also the soldiers' additional homestead scrip filed therewith, which said application is returned to your office for appropriate action.

FOREST RESERVE—SELECTION UNDER EXCHANGE PROVISIONS OF ACT OF JUNE 4, 1897.

FRANK F. MCCAIN.

Two distinct classes of exchanges are authorized by the act of June 4, 1897: first, perfected titles, where title is given and title is received, in which case nothing is required to be done by the selector but to vest the United States with good title to the land relinquished in a forest reserve and to select the land taken in lieu thereof in accordance with the law and regulations governing such exchanges; and second, unperfected claims, wherein the lands taken in exchange are taken by the selector with credit for his previous partial compliance with the law governing his entry, settlement, or claim upon the relinquished land, but with obligation under such law to do such acts as he had, prior to his relinquishment, not yet performed.

The provision in the act of July 4, 1884, that the lands in the former Columbia Indian reservation by said act restored to the public domain should be disposed of "to actual settlers under the homestead laws only," is no bar to the selection of portions of said lands in lieu of an unperfected claim to lands in a forest reserve, based upon homestead settlement, and relinquished under the exchange provisions of the act of June 4, 1897.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 12, 1905.* (J. R. W.)

The heirs of Frank F. McCain appealed from your decision of March 9, 1905, denying their homestead entry for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 3, T. 36 N., R. 21 E., W. M., Waterville, Washington, selected under the act of June 4, 1897 (30 Stat., 36), in lieu of the unperfected claim of their father, Frank F. McCain, as a settler upon the unsurveyed W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 31, T. 36 N., R. 20 W., and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 36, T. 36 N., R. 19 E., in the Washington forest reserve, established by executive proclamation of February 22, 1897 (29 Stat., 904).

The land selected and that relinquished is within the former Columbia Indian reservation and was restored to the public domain by Executive order of May 1, 1886, under the act of July 4, 1884 (23 Stat., 76, 79), which provided that after allotments to Indians—

the remainder of said reservation to be thereupon restored to the public domain and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands.

June 18, 1904, Florence M. Green, describing herself as "one of the heirs [and] for all of the heirs of Frank F. McCain, deceased," filed an application to make homestead entry for the lands selected herein above first described. Therewith she filed an affidavit that she is the daughter of Frank F. McCain, who died March 21, 1902, then unmarried, leaving the affiant, another daughter and a son of full age, and four other children now minors; that May 10, 1895, McCain made homestead settlement on lands above last described, which are non-mineral, agricultural and unsurveyed, and resided thereon and cultivated the same until his death, having made certain described buildings and other improvements of the value of \$800; that the land was after his settlement and improvement included in the forest reserve; and that the heirs desire to change their settlement to land outside the reserve and to select in lieu thereof the land herein first described. This is corroborated by two witnesses of their personal knowledge. McCain having made no entry, she tendered the fees therefor.

The local office rejected the application upon authority of William C. Quinlan, 30 L. D., 268, and upon her appeal to your office that

action was affirmed upon authority of departmental decision of August 8, 1902 (unreported), in the case of Jesse H. Sherman.

The act of June 4, 1897 (30 Stat., 36), provides—

that in cases in which a tract covered by an unperfected *bona fide* claim is included within the limits of a forest reserve, the settler may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement : *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvement, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

An entry in lieu of an unperfected claim is of the same character as the claim relinquished and the law governing the original claim applies thereto. The entry applied for in the present instance was a homestead and permissible under the act of 1884, *supra*, governing disposal of the lands here involved. In the cases of Quinlan, *supra*, cited by the local office, and Sherman, cited by your office, the land relinquished and assigned as base for the selection was held in fee simple title by patent from the United States. The selector had nothing to do in the way of compliance with the homestead law or of proof of such compliance. Those decisions are not applicable to the case here, wherein the application in its terms was not an exchange of title given for title relinquished, but is for a "transfer of settlement," as stated in the application.

There are two distinct classes of exchanges authorized by the act of June 4, 1897. First, perfected titles, where title is given for title received. They partake of the nature of private entries, warrant and scrip locations. Nothing is required to be done by the selector but to vest the United States with good title to the land relinquished in a forest reserve and to select the land taken in lieu of it in accordance with the law and regulations for making of such exchanges.

Second, unperfected claims, wherein the lands taken in exchange are taken by the selector with credit for his previous partial compliance with the law governing his entry, settlement or claim upon the relinquished land, but with obligation under such law to do such acts as he had, prior to his relinquishment, not yet performed. To such cases the decisions in Quinlan and Sherman, *supra*, are not applicable. The present application was of this class and was to make a homestead entry of land subject thereto in lieu of a right to make a homestead entry of the relinquished land for which no entry had been made for the sole reason that the land settled upon and improved had not been surveyed.

Technically speaking, the entry was properly denied for insufficiency of the relinquishment. Upon McCain's death the homestead settlement right under the law, there being no widow (Revised Statutes, Sec. 2291), descended to his children in equal shares.

(Bernier v. Bernier, 147 U. S., 242.) Three of his seven children are alleged to be of full age and four to be minors. Florence M. Green, only one of those of full age, has relinquished. Though she professes to relinquish on behalf of all she does not show a power to act on behalf of the other two of full age or as guardian for the minors. The relinquishment should be executed by all the children of full age and by a guardian for the minors duly appointed and authorized by the court so to do for the purpose of effecting a transfer of the settlement to the land selected.

The action of the local office and of your office in rejecting the application was therefore the necessary result of the insufficiency of the relinquishment, but of this defect the applicant was not advised and had no opportunity to remove it. The decision is therefore vacated and the heirs will be given reasonable time to cure the application made for all the heirs by filing a full and complete relinquishment of and on behalf of all of them.

TIMBER AND STONE ACT—PURCHASE BY MARRIED WOMAN—PROOF.

MINNIE J. McATEE.

In case of an application by a married woman to purchase under the timber and stone act, it is immaterial whether the proof that she proposes to make the purchase with her separate money and for her own use and benefit be shown by the particular specified affidavits in the regulations, or in some other manner, so long as the facts required to be shown are proved by competent evidence in some portion of the record.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 13, 1905.* (J. R. W.)

Minnie J. McAtee appealed from your decision of January 13, 1905, rejecting her proof made October 6, 1903, upon an application under the act of June 3, 1878 (20 Stat., 89), to purchase the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 13, and lots 1 and 8, Sec. 14, T. 3 N., R. 5 E., H. M., Eureka, California.

May 6, 1903, Mrs. McAtee filed at the local office her application, on form 4-601; her affidavit, in duplicate, on form 4-537; her affidavit of not having previously exhausted her rights, on form 4-102 b; and her non-mineral affidavit, on form 4-062. The register thereupon issued notice for publication for proof to be made October 6, 1903, and notice was duly given and proof thereof filed. On the day fixed Mrs. McAtee appeared at the local office and submitted proof. The government was represented by a special agent of your office, who cross-examined the applicant and her witnesses at considerable length.

In her direct testimony, on the regular blanks, to questions 11 to 15, inclusive, reduced to narrative, she testified:

I am not a practical lumberman; I expect to keep this land and lumber on it when I get title to it; I do not know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry; no person has offered to purchase this land after I acquire title to it; there is no nearest or best market for the timber on this land at the present time.

Cross-examination. I visited the land for two hours May 4, with Mr. Garrett, Dr. Perott, and Mrs. Garrett; all my information as to corners, &c., was from Mr. Garrett; neither he nor any other person has any interest in my claim, nor has offered to purchase or to find a purchaser for it or the timber thereon when I shall have acquired title; I do not know and have not heard that my locator is working for or in the interest of or has any connection with any person or firm operating, investing, or speculating in timber or timber lands; my locator is a proof witness; he has just proved up on his claim and his wife is to today; Dr. Perott and Mrs. Garrett also located adjoining me; I had no conversation with them as to what they intended to do with their claims; I know of no person, firm, or corporation, or agent of such, operating in or purchasing timber or timber lands in that vicinity; I have had no communication, verbal or written, with any such relative to purchase or sale of my claim or the timber thereon or its value; and do not know and have not heard of any person securing or procuring timber or timber lands by inducing people to make timber land entries; I have not solicited any person to make such entries in order to enable other persons to procure the timber from me; I know of no persons or firms who have recently purchased timber lands or timber in the locality; I expect to keep the land and timber when I have acquired title; I do not know how long I will keep it; I don't expect to sell it, have not made any plans to sell it; I purchase this tract for my own use, for my own benefit; I have no personal use for the timber; I expect to keep it until I get old and educate my children and derive the benefit from purchase of this land. At the time I made application for this claim I intended to make money from it and derive a benefit or I would not have taken it; the land is so situated that considering my occupation, circumstances, and condition in life I can use the money I get for the timber for my own exclusive use and benefit; I own no real estate in the vicinity or in the State; my intent as to cutting the timber myself, have some one cut it, or to sell it, is that I will without doubt have to sell it; I expect to keep the land after I have acquired title; I think I can use the money for the lumber or timber on this claim for my own exclusive use, but I can't use the timber; when I made the application it was my intent to sell the timber and use the proceeds.

The local office, making reference to but part of this testimony, and not regarding its entirety, found and held:

That . . . as she has no personal use for the timber only that she may sell it at a profit; second, that the land is inside of the reservation made by order of the General Land Office on October 1, 1903—

rejected the proof. Your office, reviewing the case upon her appeal, set out the requirements of sections 2 and 3 of the act of June 3, 1878, *supra*, and making special reference to form 4-537, page 292, general circular of January 25, 1904, held that—

None of the requirements of law prescribed by sections 2 and 3 of said act have been complied with, either in form or substance. In this connection atten-

tion is called to the ruling of the Department in 33 L. D., 265 [M. Edith Curtis], and cases therein cited, in view of which the action of your [the local] office is affirmed.

Your office in examination of the record evidently overlooked the duplicate affidavit on form 4-537, made before the register of the local office. The papers transmitted to the Department show full compliance with all the requirements of the law in due and regular form, and with all requirements of the regulations in such case provided, save the provision (General Circular of January 25, 1904, page 40) respecting entries of this kind by married women, that—

in addition to the proofs already provided for she shall make affidavit at the time of the entry that she proposes to purchase said land with her separate money, in which her husband has no interest or claim; that said entry is made for her sole and separate use and benefit; that she has made no contract or agreement whereby any interest whatever therein will inure to the benefit of her husband or any other person; and that she has never made an entry under said act or derived or had any interest whatever, directly or indirectly, in or from a former entry made by any person or association of persons.

No separate affidavit under this requirement is found among the papers, but all the matters therein required to be shown by separate affidavit of a married woman, save the provision of the first clause, are fully covered by the affidavit on form 4-537, and also by her testimony, especially that upon her extended cross-examination, above set out. In addition thereto, on cross-examination, she testified, reduced to narrative, that:

I have been employed by A. Brizard and I work in the post office, and my compensation averages during the month about \$25 or \$30 and my living expenses. I have a husband and two children; I ordinarily save out of my earnings about \$15 a month; I have kept the money which I have saved at home and then I have cattle which I buy and sell; I got this money for paying for the land and all expenses connected with the filing, out of my earnings; I am not borrowing any, it is my own money.

All the elements of proof of facts required by the law or the regulations thus fully appeared in the record. In judicial or administrative proceedings it is generally immaterial how a fact appears, so only it is proved by competent evidence in any part of the record. In the *Lake Superior Ship Canal, Railway and Iron Company v. Patterson* (30 L. D., 160, 178), speaking of notice of final proof, the Department held that:

The accomplishment of this purpose, rather than the manner in which it is accomplished, is the matter most to be considered, and where it appears that this purpose has been fully accomplished, the particular manner in which it was done becomes immaterial. Its efficiency is demonstrated.

In *J. M. Longnecker* (30 L. D., 611, 614) it was held that "a question of reservation and appropriation of public lands, there being power to make it, is one of fact rather than of mere form." Where it

is essential to allege facts taking a contract out of the bar of the statute of limitations, the courts generally hold that the defect of allegation is cured by an answer showing the fact. Where the record must show jurisdictional facts, as, for instance, diverse citizenship of the parties, it is sufficient if it appear in any part of the record, though not in the complaint, petition, or bill, where it should be alleged. It is also generally recognized that evidence given before the tribunal where the witness is subject to cross-examination, especially where the witness is in fact cross-examined, is of greater evidential value than the witness's *ex parte* affidavit.

Applying these principles, the Department is of opinion that the regulation as to proof by married women in such cases was substantially and satisfactorily complied with in the present case. Her *ex parte* affidavit as to her acquisition and ownership of the money with which she was making the purchase could add nothing toward establishing the fact that it was her own separate property beyond her testimony to such fact given orally before the local office, corroborated, as it was, by the other witnesses also orally examined, that her financial standing is good.

The land was withdrawn October 1, 1903, for the proposed Klamath River forest reserve, by an order which provided that:

Neither this temporary withdrawal, nor the permanent reservation of the lands which may follow will affect any *bona fide* settlement or claim properly initiated prior to the date hereof, provided that the settlers or claimants continue to comply with the law under which their settlements or claims are initiated.

The date of October 6th for taking of the proofs was fixed by the register, presumably because of pressure of business pending before the office, but the proceeding was initiated May 6th and was unaffected by the express terms of the withdrawal. The applicant prosecuted with diligence and complied with the law on the day fixed. The decision in *M. Edith Curtis* (33 L. D., 265), cited by your decision, merely holds that a pending timber and stone application to purchase reserves land from other disposal by a withdrawal order no longer than the time allowed for offer or proof. As the applicant herein offered her proofs on the day set by the register, the decision cited is wholly irrelevant to the case.

The local office erred in holding the application to be speculative, or for speculation, within the meaning of that term as used in the act. In that respect the case is controlled by the decision in *Annie M. Donahue et al.*, 32 L. D., 349.

The decisions of your office and of the local office are reversed, and, if no other objection appear, the proof will be approved.

TIMBER AND STONE ACT—FINAL PROOF—MARRIED WOMAN—PURCHASE MONEY.

NELLIE E. GARRETT.

The fact that a married woman making application to purchase under the timber and stone act proposes to pay from her separate money only the fees and expenses of making the entry, and to borrow upon her own credit, to be secured by mortgage on the land, the sum necessary to pay therefor, does not of itself impugn the good faith of the applicant, in the absence of anything tending to show that the person from whom she proposes to borrow the purchase money is a lumberman or engaged in acquiring timbered lands, or that under pretense of a mortgage security the entry is made or intended to be for his benefit or that of any person other than the applicant herself.

An applicant to purchase under the timber and stone act is entitled to a copy of the final proof submitted on his application.

Where in final proof proceedings a witness is asked to give a categorical answer to an interrogatory, he should be permitted, in connection therewith, to state such facts and circumstances in explanation thereof as in his opinion make the categorical answer the correct one to the question he is required to answer in such form.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, September 13, 1905.* (J. R. W.)

Nellie E. Garrett appealed from your decision of February 3, 1905, rejecting her application under the act of June 3, 1878 (20 Stat., 89); to purchase the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 12, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 11, T. 3 N., R. 5 E., H. M., Eureka, California.

The facts in this case are in every respect but one substantially the same as in that of Minnie J. McAtee, from the same local office, this day decided by the Department, and reference thereto is hereby made without repetition.

The record herein discloses that the applicant was able to pay of her separate money only the fees and expenses of her entry, and had prepared to borrow upon her own credit, to be secured by mortgage of the land, the sum to be paid for its purchase. This fact does not of itself impugn the good faith of the applicant. It is not shown that the lender, whom she named, is a lumberman or engaged in acquiring timbered lands, or that under pretense of a mortgage security the entry was made or intended to be for his benefit or that of any one but the applicant herself. Annie M. Donahue (32 L. D., 349, 353.)

There is further filed in this case the affidavit of the applicant, verified before the register of the local office, March 25, 1905, which states, among other things, that—

At the time of the taking of said proof she asked for and offered to pay for or make at her own expense a copy of said proof, but that she was refused the right

and privilege of having or making a copy of the same; that affiant's appeal in this case is thereby hampered and rendered more difficult, and she is obliged to rely upon her memory of the contents of the same. . . .

And affiant further deposes and says that her cross-examination taken and written by and before W. S. Wade, Esq., the Special Agent of the U. S. General Land Office, was not in all respects in form and substance as she wished it to be with respect to her "intent" in seeking to purchase the said land; that the said Special Agent would not permit her answers to certain of his questions to be written as she gave them; that he asked questions in which he set forth matters in a different light than she desired them to be and required her to answer them by saying simply "yes" or "no," and refused to write down any qualifying statements or explanations; that she believes the purpose of the said questions was to make her said testimony show "speculation" and an intent to defraud the government and do something she did not wish and had no purpose of doing, and that her said answers to said questions do not truly show her actual "intent," and were forced out of her in the manner above set forth; that her "intent" in seeking to purchase the said land was to hold it as an investment, just as she would do if she purchased property of that kind from a private individual.

In respect to these allegations it should be said that the applicant was entitled as a matter of right to have a copy of her final proof, to be made by her or by the local office, as might be deemed best in the discretion of said office: if made by the local office, the applicant in such case to pay the ordinary fees for the transcription of the testimony.

Referring to the statement made in the second paragraph of this affidavit, it is only necessary to say that a witness may be asked to give a categorical answer, but in connection therewith he should be permitted to state the facts and circumstances explanatory of it, which, in his view, make the categorical answer the correct one to the question he is required to answer in such form.

The decision herein is reversed, and, if no other objection appear, the proof will be approved.

SNOW *v.* DICKEN.

Motion for re-review of departmental decision of March 22, 1905, 33 L. D., 477, denied by Acting Secretary Ryan, September 23, 1905.

ADDITIONAL HOMESTEAD ENTRY—SECTION 2, ACT OF APRIL 28, 1904.

ROBERT KNOETZL.

The right to make additional homestead entry accorded by section 2 of the act of April 28, 1904, generally known as the Kinkaid Act, is limited to persons who made their original entries prior to the date of said act.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 25, 1905.* (C. J. G.)

An appeal has been filed by Robert Knoetzl from the decision of your office of May 1, 1905, sustaining the action of the local officers in rejecting his application to enter under the act of April 28, 1904 (33 Stat., 547), the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 25 N., R. 19 W., Valentine, Nebraska.

The land covered by the foregoing description is applied for as additional to homestead entry of record made by Knoetzl April 30, 1904, for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, T. 26 N., R. 19 W., and the ground for the rejection of the application to make additional entry is that the original entry was not made until after the act of April 28, 1904.

In a corroborated affidavit accompanying his application for additional entry Knoetzl stated "that he would not have entered the land described above had he not supposed that he would be permitted to amend his entry and include other lands under what is known as the Kinkaid law;" while in an affidavit filed in support of his appeal to your office, and reiterated here, he states that at the time he made his original entry he was not aware of the provisions of the act of April 28, 1904, and had no means of knowing what such provisions were. But whether he has acted in good faith or not in the matter is not of controlling moment under the circumstances, for it is clear that his application is not within the provisions of said act. Knoetzl's original entry being still of record, his application for additional entry is governed by section 2 of said act, which provides:

The entrymen under the homestead laws . . . who own and occupy the lands heretofore entered by them, may enter other lands contiguous to their said homestead entry.

The act in question which confers the additional entry privilege, in terms refers to persons who made homestead entry *prior* to said act. The language employed can not be so construed as to include entrymen who own and occupy lands entered *after* said act. The application of Knoetzl being based on an entry not in existence at the date of the act, but on one made subsequently thereto, said application was properly rejected. This has been the uniform ruling in numerous like but unreported departmental decisions.

The decision of your office herein is affirmed.

PRIVATE LAND CLAIM—SURVEY—SECTION 10, ACT OF MARCH 3, 1891.

ARROYO HONDO GRANT.

The "necessary expenses" of making survey and plat of private land grants under the provisions of section 10 of the act of March 3, 1891, one half of which are to be paid by the grant-claimant, embrace all the expenses necessary to the completion of such a survey as will be entitled to approval by the Court of Private Land Claims, including the cost of publication of notice of the survey required by the statute and the cost of additional surveys, where necessary and ordered by the court, but not including the cost of examinations in the field made by special agents of the land department.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 25, 1905.* (E. F. B.)

With your letter of September 1, 1905, you transmit the appeal of the claimants of the Arroyo Hondo Grant from the decision of your office of June 8, 1905, rejecting their application to retax the cost of survey of said grant and to eliminate therefrom the charge for publication of notices and for examination of survey in the field.

This claim has been confirmed by the Court of Private Land Claims and has been surveyed under authority of the tenth section of the act of March 3, 1891 (26 Stat., 854, 858), which provides that where any decision becomes final the Commissioner of the General Land Office shall cause the tract to be surveyed at the cost of the United States, and that notices by publication of the completion of the survey shall be given in the English and Spanish languages preliminary to its approval by the court.

When any survey is finally approved by the court, it shall be returned to the Commissioner of the General Land Office, who shall as soon as may be cause a patent to be issued thereon to the confirmer. One half of the necessary expenses of making the survey and plat provided for in this section, and in respect to which a patent shall be ordered to be issued, shall be paid by the claimant or patentee.

The cost of the survey of this claim as taxed by the Surveyor-General amounts to \$1,247.58, made up of the following items:

Cost of survey	\$580. 44
Cost of platting and other work in Surveyor-General's office	75. 00
Cost of first examination in the field of the survey	334. 80
Cost of publication of notice in El Boletín Popular	62. 80
Cost of publication in the Santa Fe New Mexican	58. 80
Cost of second examination in the field of survey	135. 74
Total	\$1, 247. 58

The claimants contend that they are not chargeable with any part of said expense, except the cost of making the actual survey in the

field and the plat thereof. The question therefore presented by their appeal is, What are "the necessary expenses of making the survey and plat provided for in this section?"

The logical and most reasonable interpretation of the section is that they are the expenses necessary to the completion of such a survey as will be entitled to approval by the court. The "survey and plat provided for in this section" is a survey of which notice by publication in the manner provided by the statute has been given, and which must be given as a necessary step to authorize its approval by the court. It is therefore a legitimate and necessary expense to the making of the survey and plat, one-half of which must be paid by the grant-claimant or patentee.

Objection is also made to what appellant contends is an excessive charge of the cost of survey in the field, in this: It is stated in the appeal that the cost of the survey as first returned by the deputy surveyor was \$261.80. Objection was filed by the United States to that survey and it was returned by the court for correction. It involved an additional cost of \$318.64, making the sum total for cost of survey in the field \$580.44, which was paid to the deputy-surveyor.

Appellants insist that as the objection was filed by the United States to the first survey and no objection was made by claimant, if any error occurred in the first survey it was due to the fault of the officials of the United States and claimants should not be charged for such errors.

A deputy surveyor is an officer of the United States in a limited sense only. He is required to take the official oath and to perform his duties under the direction of the Surveyor-General, but his work is by contract and when the contract is executed his relations with the government terminate.

Furthermore, the 10th section of the act, under authority of which this survey was made, provides that upon the return of the survey to the Surveyor-General, it shall remain in his office open to objections for ninety days. If no objections are filed the Surveyor-General shall approve the same and forward it to the Commissioner. If objections are filed, they shall be forwarded with the survey and the Commissioner of the General Land Office shall transmit them to the court with the survey, and "if found to be incorrect, the court shall return the same for correction in such particulars as it shall direct."

It is presumed from the statement in the appellant's brief that the additional cost of \$318.64 was made pursuant to the direction of the court given under authority of the provision above referred to and not by any direction of the United States officials, who had no authority to determine whether the survey was made in conformity

with the decree. So that, if the deputy surveyor was entitled to any pay for the extra work performed under the direction of the court it was a legitimate charge and the United States is only liable for one-half of the expense.

The cost of examination in the field by a special agent of your office is not a necessary expense for obtaining such a survey and plat as will be entitled to approval by the court and hence no part of such cost is chargeable against the grant-claimant. Those examinations are provided for by special appropriations and are made for the purpose of ascertaining whether the survey complies technically with the manual and regulations of your office. The determination of whether the survey returned by the deputy is in accordance with the decree rests solely within the jurisdiction of the court.

The act of July 31, 1876 (19 Stat., 121), relative to the survey of private land claims, which was in force prior to the act of March 3, 1891, as to all claims provided for by the latter act, contained a provision "that a patent shall not issue, nor shall any copy of such survey be furnished, for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the party or parties in interest or any other party." In construing this act it was held that the only costs chargeable to claimants are for the actual survey in the field and for making the plat thereof and that other expenses incurred by the government in investigating the claim preliminary to the survey are not chargeable against the claimant. (Rancho Santiago de Santa Ana, 2 L. D., 371.) To the same effect is the decision in Pueblo of Monterey (13 L. D., 294).

These decisions rest upon the same principle, that there are many expenses necessarily attendant upon the survey of such claims that the government properly incurs in making investigations for the purpose of ascertaining the validity of claims and the correctness of the work of its officials which are for its own protection and interests and are merely incidental to and not a necessary expense of the survey. That principle applies with equal force as to the survey provided for by the tenth section of the act of March 3, 1891, and in determining what are the necessary expenses of making such survey and plats.

You will therefore eliminate from such cost the charge for making examinations in the field.

Your decision is modified accordingly.

STATE SELECTION—PREFERENCE—ACTS OF MARCH 3, 1893, AND
AUGUST 18, 1894.KAY *v.* STATE OF MONTANA.

Failure on the part of a State to publish notice of an application for the survey of lands within thirty days from the date of such application, as provided by the act of August 18, 1894, does not affect its preference right to select such lands, for the period of sixty days from the filing of the township plat of survey, conferred by the act of March 3, 1893.

The provision in the act of March 3, 1893, according to certain States a preference right, over all persons or corporations, except prior settlers, for a period of sixty days from the filing of the township plat of survey, within which to select lands under grants made by the act of February 22, 1889, was not repealed by the provisions of the act of August 18, 1894, according a similar right of selection for a period to extend from the date of application by the State for the survey of the lands until the expiration of sixty days from the date of the filing of the township plat, provided notice of the application for survey be published within thirty days from the date of the filing of such application.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 27, 1905.* (E. J. H.)

The above entitled case is before the Department upon the appeal of Albert H. Kay from your office decisions of January 28 and March 14, 1905, rejecting his application to purchase the NW. $\frac{1}{4}$ of Sec. 2, T. 29 N., R. 27 W., Kalispell, Montana, land district, under the timber and stone act of June 3, 1878 (20 Stat., 89).

On March 14, 1899, the governor of the State of Montana filed an application for the survey of the described township, and the lands therein were withdrawn from settlement and entry or other disposition adverse to the State, under the act of August 18, 1894 (28 Stat., 394). Such withdrawal was to become effective on March 18, 1899, the date of receipt of said application in your office, and publication of notice of the application for survey and of the State's preference right of selection was made, commencing April 27, 1899.

It appears that on October 17, 1904, the township plat of survey was filed in the local office and on the same day Kay filed his application to purchase the tract in controversy under the timber and stone act, and November 21, 1904, within sixty days from the filing of the township plat of survey, the State of Montana presented its application to select said tract with others, under the grant of lands for public buildings made by the act of February 22, 1889 (25 Stat., 681), admitting said State into the Union.

The State's application was rejected for conflict with the prior application of Kay, from which the State appealed, alleging error in rejecting its application and in allowing adverse filings during the time the State had a preference right under the act of 1894.

January 28, 1905, your office decision held, that as the publication of notice by the State was not commenced within thirty days after the filing of its application for survey, the reservation, being conditioned thereon, expired upon the lapse of time, the conditions whereby it could be prolonged in force not having been complied with (32 L. D., 240); but it was held that the State had a general preference right of selection for sixty days after the filing of the township plat, as against all persons not claiming settlement on the date of such filing, under the act of March 3, 1893 (27 Stat., 593); and that under said act no publication was required. *McFarland v. State of Idaho* (32 L. D., 107).

The action of the local officers in accepting applications not based upon settlement, adverse to the rights of the State, was held to be erroneous, and all such applications, including that of Kay under the timber and stone act, were rejected, and the local officers were instructed not to allow any of said applicants to complete entry.

It appears that subsequently to the transmission to your office by the local officers of the foregoing appeal by the State, said officers, on January 17, 1905, transmitted a motion filed by Kay to dismiss said appeal, but that the same not having been filed with the record, it was not considered in your office decision of January 28, 1905. In this motion to dismiss it was alleged that no notice of said appeal was served by the State upon Kay.

It also appears that on February 11, 1905, the local officers transmitted to your office the record on appeal in the matter of the proof submitted by Kay on January 13, 1905, in support of his application under the timber and stone act, which proof was rejected by the local officers for the reason that the State had a preference right of selection for sixty days after the filing of the township plat as against all who were not settlers.

March 14, 1904, in considering said matters, which had been received from the local office and filed with the papers in the case since the original record was acted upon by your office, it was held that while there was no evidence that the State had served notice of its appeal upon Kay, inasmuch as the motion to dismiss went into the merits of the case, it must be denied.

In regard to the rejection by the local officers of Kay's proof, it appears that in his appeal therefrom he alleged that the State had made selections in excess of its grant for public buildings, and that its application to select was not accompanied by the required certificate that said selections, together with those approved and pending, did not exceed the grant. With reference thereto your office decision found from the records of your office that such selections do not exceed the grant, and held that the absence of a certificate to that effect did

not invalidate the selection, as it might be supplied on motion; that such certificate is only required for the guidance of the local officers, and as it was shown that the State had not in fact exceeded its grant no further consideration need be given thereto. The action of the local officers in said matters was affirmed.

It is strongly urged in the appeal that as the acts of March 3, 1893, and August 18, 1894, are both enactments upon the same subject, and as the later act, with its enlarged scope, provides a more effective method for securing to the State a preference right to select lands under its grants, it was intended that such later act should supersede and abrogate the provisions of the earlier act; that inasmuch as the State failed to make the publication of notice required by the act of 1894 it is concluded from asserting any right to the land in controversy as against Kay, who tendered his timber and stone application therefor on the day of the filing of the township plat of survey long prior to the proffer of the State's list of selections.

In the case of *McFarland v. State of Idaho* (32 L. D., 107), it was said, on page 109, that—

The principal difference between the acts of 1893 and 1894 is, that under the act of 1893 lands are reserved for the benefit of the State for a period of sixty days from the filing of the township plat of survey, whereas, under the act of 1894, they are reserved from the date of the filing of the application for survey, if the publication required by that act is made. There would seem to be no good reason why the State may not apply for a survey of these lands under the act of 1894, and waive its right to have them withdrawn from the date of the application by failing to publish the necessary notice, inasmuch as it had a right to rely, and did rely, upon the terms of the act of 1893, for a preference right for sixty days from the filing of the township plat of survey. It is not believed that the State lost any right which it otherwise had under the act of 1893, by failing to comply with some of the requirements of the act of 1894.

There is no material difference in the situation in the above cited case from that in the case under consideration, the only difference being that in the former it does not appear that the required notice was ever published, while in this case the notice was published but not within the time required in said act of 1894, so that the withdrawal did not become effective.

A careful examination of the cases of *Thomas R. Grindley et al.* (16 L. D., 467) and *United States v. Tynen* (11 Wall., 88), cited in support of the contention of Kay that the act of 1893 was repealed by the act of 1894, discloses that said cases can not be considered as authority for such claim. In each of those cases, wherein was involved this question of the repeal of a statute by the enactment of a subsequent one upon the same subject, with no expressed provision therein for such repeal, there are provisions in the later acts that are repugnant to provisions in the earlier ones. That is not true in the case under consideration.

Under the act of 1893 the State is given a preference right for sixty days after the filing of the township plat of survey within which to make its selections as against all except settlers. The practical operations under that act undoubtedly disclosed that prior to and pending the survey in the field, many of the best tracts were settled upon and so were lost to the State, and it was obliged to take the inferior lands, hence the act of 1894 was passed, to enable the State to ask for the survey and have the lands reserved from settlement from the date of such application, thus giving the State an enlarged opportunity to secure the selection of lands under its grants, and that was the undoubted purpose Congress had in view in passing it. If it be held that said act abrogated and repealed the act of 1893, then the State has no preference right of sixty days after the filing of the plat of survey within which to make its selections, in any township wherein it has not applied for the survey, published timely notice thereof and secured the withdrawal of the lands from settlement or other adverse appropriation.

In the case of the *United States v. Tynen*, *supra*, cited on behalf of Kay, it is said that "when there are two acts on the same subject the rule is to give effect to both if possible." There appears to be no difficulty in giving effect to both of the foregoing acts. Then the State can apply for the survey, publish the required notice and have the lands withdrawn with the preference right of sixty days after survey for making selections. But if the State for any reason fails to apply for the survey and withdrawal or to cause notice thereof to be published, it can await the survey by the Government in the ordinary course, and have its preference right of sixty days for making selections after the filing of the plat against all but prior settlers. No unfairness to settlers or the general public would accrue from such a situation, as after applying for survey and withdrawal, if no timely notice thereof was published, there would be no effective reservation, and settlements made at any time prior to the filing of the plat would be good.

Regarding the refusal of your office to dismiss the appeal of the State from the action of the local officers in rejecting its selection list, because no service of said appeal was made; and also the failure to hold that the omission of the State to file with its selection list a certificate that the selections therein, together with those approved and pending, did not exceed the grant, the department is of opinion that under the circumstances your office rulings were correct.

Your office decisions are accordingly affirmed and the application by Kay to make purchase will stand rejected.

NEW MEXICO—LEASE—SECTION 10, ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

All leases or "permits for right of pasturage" issued by the board of public lands of the Territory of New Mexico under the provisions of acts of the legislative assembly of that Territory, and covering any of the lands granted to the Territory by the act of June 21, 1898, should be limited, in accordance with the provisions of section 10 of that act, to not exceeding one section or 640 acres of land to any person, corporation, or association of persons, and all such leases or permits must be submitted to the Secretary of the Interior for his approval.

Assistant Attorney General Campbell to the Secretary of the Interior,
September 28, 1905. (G. B. G.)

By reference of the Acting Secretary, August 24, 1905, I am asked for opinion whether "Permits for Right of Pasturage," issued by the Board of Public Lands of the Territory of New Mexico under the provisions of an act of the legislative assembly of said Territory, approved March 20, 1901, should be submitted for the approval of the Secretary of the Interior under the provisions of the act of June 21, 1898 (30 Stat., 484), and whether under the terms of said act these permits should be limited in area to six hundred and forty acres of land.

The lands in question were granted to said Territory by the said act of June 21, 1898, and section 10 thereof authorizes the legislative assembly to make provision for "leasing all or any part of the lands granted in this act," not to exceed one section to any one person, corporation, or association of persons, "but all leases made under the provisions of this act shall be subject to the approval of the Secretary of the Interior, and all investments made or securities purchased with the proceeds of . . . leases of lands provided for by this act shall be subject to . . . approval by the Secretary of the Interior."

It appears from certain correspondence, relative to this matter, between the Commissioner of the General Land Office and the Commissioner of Public Lands for the Territory, and from copies of some of these permits submitted therewith, that grazing lands granted to the Territory, as aforesaid, are being occupied in large bodies under authority of these permits, none of which, it seems, were submitted to the Secretary of the Interior for his approval; and it is further suggested that the proceeds arising from these permits are not being invested in securities with the approval of the Secretary of the Interior, or at all, but are being used for the support of the Public Land Board.

I am of opinion that these permits are leases in form and substance,

and it seems clear that they are called permits for the purpose of avoiding the provisions with reference to leasing these lands found in the granting act, *supra*. This is substantially admitted, it being urged that the necessities and best interests of the Territory demand that these grazing lands be leased in large bodies. In so far as these leases undertake to authorize the occupation and use of more than one section, or six hundred and forty acres of land, by any one person, corporation, or association of persons, they are in violation of both the letter and spirit of the granting act, *supra*, and therefore null and void. It is also clear that if otherwise valid they are without force and effect, unless they have been submitted to and approved by the Secretary of the Interior. I advise you that these permits, or leases, should be submitted to the Secretary of the Interior for his approval, and that such approval should be withheld if they embrace more than one section of land.

Approved:

THOS. RYAN, *Acting Secretary*.

POWER OF SECRETARY TO WITHDRAW PUBLIC LANDS FOR MUNICIPAL PURPOSES.

OPINION.

The Secretary of the Interior has no power to withdraw from disposal under the general land laws public lands occupied and improved by a town for the purpose of storing and conducting a water supply to the town, pending Congressional action authorizing the town authorities to make entry of the same; but action upon any application to enter such lands may be suspended by the land department until the town authorities have been afforded opportunity to secure the contemplated legislation.

Assistant Attorney-General Campbell to the Secretary of the Interior,
September 30, 1905. (E. F. B.)

I am in receipt of a report from the Commissioner of the General Land Office upon the request of Hon. H. M. Hogg that certain public lands in Colorado be withdrawn from entry pending contemplated legislation by Congress granting the same to the town of Mancos, Colorado.

It is stated in a certified copy of a resolution passed by the board of trustees of said town that the tract is desired for the purpose of storing and conducting water to supply the town; that the municipal authorities have expended \$25,000 in constructing upon the lands described a system of water works for said town, and the Senators and Representatives of said State are requested to procure the enact-

ment of such legislation by Congress as will enable the town authorities to make entry of the same. The Commissioner reports that the land is unappropriated and recommends that the withdrawal be made.

The matter is referred to me for opinion as to whether the action requested can be lawfully taken.

The Secretary of the Interior has no authority to withdraw lands from the operation of the general land laws except as the means to accomplish some end in the performance of the duties enjoined upon him in the disposal of the public lands, or to reserve them for public uses as the exigencies of the public service may require.

The power to temporarily withhold lands from the operation of the general land laws with a view to submitting to Congress any question as to their disposal is inherent under the general authority to supervise and regulate the manner of acquiring public lands so that all persons may have equal opportunities and advantages in acquiring such lands under the general land laws, but that power must be exercised in the interest of the public and cannot in my opinion be extended to authorize a withdrawal or reservation of land for the benefit of an individual or a corporation although the corporation may be a municipality.

But while the land may not be withdrawn from entry or filing so as to take it out of the category of public lands as that term is technically applied, it would not be an abuse of authority to suspend temporarily all action looking to the final disposal of the land until such time as the executive authority may consider the equities of the case.

So far as appears from anything contained in the record, the land may be appropriated for the purposes contemplated under the right of way acts, and as it has already been improved by the construction of a reservoir and pipe lines to the extent of \$25,000 and the town authorities contemplate securing Congressional action authorizing the acquisition of the land, I can see no reason why the Commissioner should not be instructed to suspend action upon any application to enter such land until the town authorities have been afforded the opportunity of securing the contemplated legislation.

Approved:

E. A. HITCHCOCK, *Secretary*.

RAILROAD GRANT-ADJUSTMENT-ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO.

Where a tract of land was inadvertently patented to the Northern Pacific Railway Company, either prior or subsequently to the act of July 1, 1898, during the pendency of an application to make homestead entry thereof based upon settlement made in good faith prior to January 1, 1898, the conflicting claims of the company and the settler are subject to adjustment under the provisions of said act notwithstanding the issuance of such patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 4, 1905.* (F. W. C.)

Your office letter of July 29, last, forwards a request, made by resident counsel for the Northern Pacific Railway Company, that the approval of a certain list, May 8, 1905, known as Vancouver list No. 71, of lands subject to relinquishment under the act of July 1, 1898 (30 Stat., 597; 620), by the Northern Pacific Railway Company, as successor to the Northern Pacific Railroad Company, be revoked as to the tract embraced in the individual claim of Frederick Girard, namely, the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 19, T. 3 N., R. 2 E., for the reason that in the opinion of the railway company the conflicting claims are not subject to adjustment under the act of 1898, the tract having been patented to the railway company prior to the passage of said act, to wit, May 27, 1895.

So much of the act in question as is material to the question under consideration is as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department. . . .

The company's contention is that where land had been patented prior to the passage of the act it can not be said that the claim of the company rests upon a mere definite location or selection; in other words, that it is not land "to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection," the effect of the patent being to fix and determine the right of the company thereto, and in this connection it is argued that should it be held otherwise the necessary result would be to open anew many controversies settled and disposed of prior to the passage of said act, which is clearly contrary to the spirit of the act, it being one of repose.

The tract here in question is within the overlap of the two grants made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat., 365), and the resolution of May 31, 1870 (16 Stat., 378), where the same meet in the neighborhood of Portland, Oregon. The line to the east of Portland down the Valley of the Columbia river was never definitely located nor constructed; the line to the north of Portland was constructed. Within this overlap the Department held, July 18, 1895 (*Spaulding v. Northern Pacific Railroad Company*, 21 L. D., 57), that (syllabus):

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act.

The application of Spaulding in this case had been filed a number of years prior to the departmental decision; in fact, your office decision upon his application was made May 21, 1892. It will thus be seen that the question as to the rights of the Northern Pacific company in the overlap referred to had been an agitated question for a number of years. It might be here stated, although not material to this case, that in a suit subsequently brought to have judicially determined the rights of the Northern Pacific Railway Company within the conflict referred to, the Supreme Court sustained the claim of the railroad company.

From the proof filed by Girard in support of his election to retain the tract in question as against the railway company, under the provisions of the act of July 1, 1898, it appears that he made settlement upon this land as early as May, 1887; that he continued residing thereon until May, 1894, making valuable improvements; that on July 13, 1891, he tendered a homestead application for this land, which, although rejected at the time, was decided in his favor upon appeal. It will thus be seen that the patenting of the tract to the railway company in 1895 was a clear inadvertence, as Girard's homestead application was at that time pending undisposed of. What good reason can therefore be advanced for denying Girard the benefits of the act of July 1, 1898? He had settled upon the land believing it to be excepted from the railroad grant and resided thereon, with his family, for more than seven years; formally tendered his homestead application, and his right of claim thereto was sustained by a decision of this Department and the issue of the patent to the railway company in the meantime was an inadvertence.

It does not appear that the railway company made any disposition of this land prior to the passage of the act of July 1, 1898, and what-

ever might be said in a case where the land had been in accordance with an adjudication patented to the company prior to the passage of said act, the Department is clearly of opinion that the conflicting claims to the tract in question are subject to adjustment under the provisions of said act, and the request for revocation of the departmental approval of the list including this tract is denied, and you will again invite the company to make relinquishment of the tract, advising them of the conclusions herein reached.

It would seem that the better course to pursue, where the land has been patented to the company, whether before or after the passage of the act of July 1, 1898, would be to request of the company a formal reconveyance of the land preliminary to its inclusion in a list for relinquishment under said act.

FOREST RESERVE—RAILROAD GRANT—ACT OF MARCH 2, 1899.

NORTHERN PACIFIC RY. CO. *v.* MANN (ON REVIEW).

Even if it be admitted, as contended by the Northern Pacific Railway Company, that the Northern Pacific land grant can never be fully satisfied from selections made within the limits provided for in the act of July 2, 1864, and the joint resolution of May 31, 1870, such fact furnishes no authority for permitting the company to relinquish the lands within the Mount Ranier National Park and the Pacific forest reserve falling within the secondary or indemnity limits of its grant, and to select other lands in lieu thereof, under the provisions of the act of March 2, 1899.

Departmental decision in this case of June 19, 1905, 33 L. D., 621, adhered to.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 5, 1905.* (F. W. C.)

With your office letter of July 20, last, was forwarded a motion by the Northern Pacific Railway Company for review of departmental decision of June 19, last (33 L. D., 621), in the case of the Northern Pacific Railway Company *v.* William J. Mann, involving certain described lands in T. 42 N., R. 2 E., Coeur d'Alene land district, Idaho, wherein it was held that section 3 of the act of March 2, 1899 (30 Stat., 993), authorizing the Northern Pacific Railway Company, upon relinquishment of lands in the Mount Ranier National Park and the Pacific forest reserve theretofore granted to said company, to select, in lieu thereof, an equal quantity of non-mineral public lands, does not contemplate the relinquishment by the railway company of the lands within the reservations falling within the secondary or indemnity limits of the grant, the same not having been selected and not being subject to selection at the date of the passage of said act, with the consequent right of selection of other lands in lieu

thereof, but applies only to the lands within the primary or place limits to which the rights under the grant had attached at that date.

In the decision under review, in arriving at the conclusion above announced, it was said:

In the first place, these indemnity or base lands were all unsurveyed and had been by proclamation dated February 20, 1893 (No. 44, 27 Stat., 1063), reserved from all settlement, entry or other disposition on account of the Pacific forest reserve thereby created. No selection was possible on account of the grant while the lands were unsurveyed, and, as a consequence, all right of further selection was terminated by the proclamation referred to so long as the lands remained reserved for forestry purposes. No good purpose was therefore apparent for providing for a release of these indemnity lands, and while it might be admitted that a right of selection would still exist should the reservation terminate, yet this furnishes no reason for securing the company's release, as the necessity therefor would surely cease upon the termination of the reservation.

A more controlling reason for denying the company a right of selection in lieu of these indemnity lands is, that to recognize such a right would clearly amount to an increase in the grant in this: that it would result in extending the granted limits to the outer indemnity limits in this locality. No such purpose is indicated, and under well-known rules of construction the claim which amounts to an addition or increase in the grant must be and is accordingly denied.

The motion alleges that:

while the case was pending on appeal the railway company filed with the Commissioner of the General Land Office a description of all lands selected by it in lieu of tracts in its indemnity limits within the Pacific forest reserve, aggregating 26,280 acres, and also a tract for tract designation of losses to the company's grant in place by reason of mineral classifications. These losses aggregating 26,280 acres, show that a quantity of land exactly equal to that within the indemnity limits in the Pacific forest reserve has been elsewhere lost to the grant in place. There are no other available lands from which these losses can be satisfied, and it is manifest, therefore, that in recognizing the company's right to select in lieu of Pacific forest reserve indemnity lands, there would be no increase in the total acreage of the company's grant, but merely a satisfaction of a portion of the acreage lost to it by reason of mineral classifications. The company by its relinquishment of right to select indemnity lands in the area then embraced in the Pacific forest reserve, placed itself in the position of renouncing the right to satisfy its large losses within the place limits, from these lands, whenever they should become subject to indemnity selection. It is true, as stated in the departmental decision, that no selection was possible until survey of lands, and that the lands being withdrawn by executive proclamation, no indemnity selection thereof has yet at any time been possible. Nevertheless, there existed at the time of the company's relinquishment pursuant to the act of March 2, 1899, and still exists, a possibility that the lands will be restored to the public domain, and thus rendered subject to selection. This possibility of future selection was a valuable right and one which the company lost by its relinquishment. As shown in our former brief the clear understanding at the time was that the company should, in lieu of its relinquishment, secure an increase of indemnity area elsewhere. This does not

mean the addition of a single acre to the grant, but simply the opportunity of satisfying losses in full or with some degree of approximation.

We respectfully submit that the obvious intent of the transaction, on both sides, was that this additional field of indemnity selections should be given, in return for the railway company's forever extinguishing its right to avail itself of these lands. Any other construction of the agreement is at once inequitable and unilateral.

The mere fact that the lands in the Pacific forest reserve were withdrawn prior to the passage of the act of 1899, does not affect the case. The lands were all unsurveyed and under departmental decisions, the company could not select them on that account. It was and still is true, however, that the company has lost more lands than it can ever secure indemnity for within existing limits and to now take away its opportunity to indemnify its losses up to 26,280 acres means a diminution of the grant to that extent. As indicated in the brief filed on appeal, the right of indemnity is a valuable right, capable of assignment, and there is a plainly expressed transfer of this indemnity in the company's release filed in this case and duly accepted by the Department. Having filed a list of lands lost to the grant within its place limits, the increase suggested is impossible. On the contrary, to adhere to the former decision will mean a reduction in the grant of 26,280 acres.

The matters set forth in this motion and not considered in the previous decision, amount to an allegation that the Northern Pacific land-grant can never be fully satisfied from selections made within limits provided for in the act of July 2, 1864 (13 Stat., 365), and the resolution of May 31, 1870 (16 Stat., 378), a claim this Department can not accede to; but if it be as alleged, such allegation furnishes no sufficient reason for disturbing the decision heretofore rendered in this case. That decision was made under a construction of the act of 1899 in the light of the known conditions at the time of its passage, without consideration of the question as to whether the Northern Pacific land-grant, as a whole, could be satisfied, and from the nature of the legislation it can not be seriously contended that that question could or should control its construction. If the act of 1899 authorized the selection of other lands in lieu of those odd-numbered sections within the indemnity limits not previously selected, then that right exists without regard to the question as to whether the land-grant, as a whole, might be satisfied elsewhere within the limits prescribed by law.

With regard to the possible right or necessity to resort to these indemnity lands in the future in partial or full satisfaction of the grant, it may be that the release of the lands in place carried with it the right to an indemnity limit bordering on and adjoining the lands released; but waiving this question, it seems to the Department at this time that in the event these indemnity lands are opened to general disposition in the future, the relinquishment heretofore executed by the railway company under the act of 1899 should not be construed as preventing the company from asserting claim thereto at that time.

As said in the decision under review:

With regard to the claim that in relinquishing under the act of 1899 all its rights etc., in and to all lands granted by the act of July 2, 1864, and acts amendatory thereof and supplemental thereto, "by way of indemnity or otherwise," the railway company intended and did waive its indemnity privileges, it is sufficient to say that such fact, if understood at the time, was no cause for rejecting the relinquishment and that as the acceptance thereof was in the terms of the act of 1899 it can not be construed as enlarging its provisions.

After a most careful consideration of the entire matter, as presented on review, the Department adheres to its previous decision, and the motion is accordingly denied.

SWAMP LAND—ADJUSTMENT—CHARACTER OF LAND.

CULLIGAN *v.* STATE OF MINNESOTA (ON RE-REVIEW).

In the adjustment of all claims resting on a selection or exchange of lands, presented in accordance with law for public lands in the State of Minnesota, prior to survey thereof, the land department will, by hearing or otherwise, determine the true character of the lands selected, if claim is presented thereto on behalf of the State under its swamp land grant, based upon the field notes of survey, notwithstanding the return of the field notes of survey of the township may afford a sufficient base for the State's claim. Departmental decision in this case of July 13, 1905, 34 L. D., 22, modified.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 5, 1905. (F. W. C.)

On the 22nd instant there was filed in this Department, on behalf of the State of Minnesota, a motion for review in the case of Patrick Culligan *v.* State of Minnesota, involving an application to contest the swamp land selection for the State of Minnesota for certain lands in sections 25 and 26, T. 57 N., R. 8 W., Duluth land district, Minnesota.

This case was first considered by the Department in its decision of April 14, 1904, not reported, which affirmed your office decision of June 17, 1903, rejecting Culligan's application to contest. A motion was filed for a review of said decision, which was entertained November 29, 1904, and in the order of entertainment, of which a copy was required to be served on the State, it was said:

The case involves the question of an alleged right, legal or equitable, of a claimant for lands in the State of Minnesota under the acts of June 4, 1897 (30 Stat., 34), and March 2, 1899 (30 Stat., 993), and upon selections thereunder made prior to survey, to dispute the claim of the State to such lands under its swamp land grant and inquire into the real character of such lands

at a hearing before the local office, notwithstanding they may, subsequent to such selections and prior to the final approval thereof by the Secretary of the Interior, have been returned by the surveyor-general as swamp and overflowed lands, and notwithstanding the regulations of March 16, 1903 (32 L. D., 65), which seem to preclude such inquiry.

The record made on review shows that service of the motion and order were duly made upon the State and that an argument was filed on behalf of the State in opposition to the granting of the motion. The motion was considered in departmental decision of July 13, 1905 (34 L. D., 22), and granted. In said decision it was said:

The claim of Culligan arose upon certain forest lieu selections under the act of June 4, 1897 (30 Stat., 11, 36), and a selection by the Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat., 993, 994), and upon the subsequent assignment of the claims to him. The acts in question authorized the selection of unsurveyed lands, and the selections in question were in fact made prior to the survey of the township in which they are situated, and were in fact a mere exchange of lands. At the date of the selections it was not known, and not possible to know or surmise, that the field-notes of the survey to be thereafter made would designate these lands as swamp. The selectors, therefore, were without other notice of the character of this land than such as resulted from an examination upon the ground. It is sufficiently alleged that such examination was made and showed the land in controversy be high and dry, and not swamp, and movant asks that he be permitted to show this at a hearing.

It is thought that in equity and good conscience this should be done, and it is so ordered.

In the further adjustment of all claims heretofore or hereafter initiated in accordance with law for public lands in the State of Minnesota, prior to the survey thereof, in instances where a selection of such lands is made by the State under its swamp land grant, and the field-notes of survey afford a sufficient basis for such selection, your office will, by hearing, or otherwise, determine the true character of the land, notwithstanding the return in the field-notes of survey of the township.

In the motion for re-review it is urged that the change should not be made in the existing regulations of March 16, 1903 (32 L. D., 65), providing for the adjustment of the swamp land grant in the State of Minnesota, without giving the State an opportunity to be heard in opposition to the change.

Culligan's motion admits that the decision of April 14, 1904, against him was in accordance with these regulations but it was sought by his motion to have the regulations modified and the order entertaining said motion was drawn with a view of bringing to the attention of the State particularly this feature. From a review of the matter it can not be said that the change was made without due opportunity of the State to be heard in the premises. It is noted, however, that in the final paragraph of the departmental decision of July 13, last, on the motion for review, containing an order for the modification of existing regulations, the language used is capable

of a construction not intended. It is broad enough to include a settlement claim and this would amount to a return to the departmental decision in the *La Chance* case (4 L.D., 479), a purpose not intended.

The entire decision shows that its scope was intended to be limited to protect only those cases where a selection of exchange of lands is permitted by law to attach prior to the survey of the lands, the claim being, when filed, a complete one, it but remaining to adjust the boundaries thereof to the lines of the public survey when extended over the lands selected. To this extent the decision on review is modified and the final paragraph in the decision on the motion for review is amended so as to read:

In the further adjustment of all claims resting on a selection of exchange of lands heretofore or hereafter presented in accordance with law for public lands in the State of Minnesota, prior to the survey thereof, you will, by hearing or otherwise, determine the true character of the lands selected, if claim is presented thereto on behalf of the State under its swamp land grant, based upon the field notes of survey, notwithstanding the return of the field notes in the survey of the township may afford a sufficient base for the State's claim.

CALIFORNIA AND OREGON LAND CO. ET AL.

Motion for review of departmental decision of June 5, 1905 (33 L. D., 595), denied by Secretary Hitchcock, October 6, 1905.

RAILROAD GRANT-ADJUSTMENT-ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO.

Under the provisions of the act of July 1, 1898, the Northern Pacific Railway Company is bound to accept the list of lands subject to relinquishment under said act prepared and submitted to it by the Secretary of the Interior, and can not, as a matter of right, require of the individual claimant the establishment of his claim at a hearing; but where a settlement claim has, upon an *ex parte* showing by the settler, been included in such a list, the Department, notwithstanding the approval of the list, has the right to inquire, by hearing or otherwise, whether the showing on which the tract was listed represented the true condition or status of the tract involved on January 1, 1898.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 6, 1905.* (F. W. C.)

Your office letter of the 28th ultimo presented for departmental consideration the question as to the proper action to be taken upon a showing filed attacking the good faith of a settlement claim which has, upon an *ex parte* showing, been included in a list of lands sub-

ject to relinquishment by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), which list has received departmental approval.

The inquiry is made in connection with the individual claim of James Dalglish to the SW. $\frac{1}{4}$ of Sec. 23, T. 11 N., R. 19 W., Missoula land district, Montana. It seems that the tract in question was included in what is known as Montana List No. 28, of lands subject to relinquishment under the act of July 1, 1898, a copy of which was furnished the railway company with request for relinquishment under said act, and in response thereto there was filed what is known as relinquishment No. 28, State of Montana, the tract in question being omitted because of the reported contract for the sale thereof to Marcus Daly, February 9, 1899, subsequently to the passage of said act.

Following the decision of the Supreme Court in the case of *Humbird et al. v. Avery et al.* (195 U. S., 480), the company was again invited to relinquish the tract in question, and in response thereto affidavits by three persons are filed to the effect that they are acquainted with the land; that careful examination was made thereof on May 27, 1899, and again January 24, 1902, and no improvements were found thereon or indications that the land had been occupied and cultivated by James Dalglish or any other person or persons; and that the land is mountainous in character, heavily timbered, and is wholly unfit for cultivation.

The tract was listed for relinquishment by the railway company upon the *ex parte* showing filed by Dalglish, which is to the effect that he settled upon this land in December, 1899, and continually resided thereon to the time of filing his election in April, 1903; that he built a house thereon in December, 1897; that a portion of the land was cleared, plowed and fenced and crops raised thereon; and that he "improved it each year since 1897, to present time."

Under the regulations of February 14, 1899 (28 L. D., 103), issued under the act of 1898, it was proper to list the tract in question upon the *ex parte* showing of the individual claimant. The list so prepared received departmental approval before the railway company was advised of the filing of the claimant's election to retain the land.

The act of 1898 provides: .

That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal.

It seems, therefore, that under the act of 1898 the railway company is bound to accept the list as prepared and submitted to it by this Department. It can not therefore, as a matter of right, require of the

individual the establishment of his claim at a hearing. The evident purpose of the act of 1898 was to aid a speedy adjustment of conflicts between individuals and the railway company and to put an end to the expense and delay incident to the ordinary contests. The company can not therefore appear as a contestant in this matter. On the other hand, the Department should not knowingly permit itself to be imposed upon nor should it require of the company a relinquishment of land to which there was in fact no real claim on January 1, 1898. Notwithstanding the approval of the list the Department has the right to inquire whether the showing on which the tract was listed represented the true condition or status of the tract involved. The showing filed by the railway company in the case under consideration tends to discredit the showing filed by Dalglish and upon which this tract was listed for relinquishment, and in the opinion of this Department the railway company should be advised that if it will serve the same upon Dalglish the matter will be taken up by your office for consideration, after the usual length of time to be allowed Dalglish to make response thereto, when, if upon the entire record as made in this way your office believes the showing filed in opposition sufficient to discredit the showing filed by Dalglish, you will, by hearing or otherwise, investigate the matter in order to arrive at the true condition of the land on January 1, 1898, the nature of the claim then being asserted to the land by Dalglish, and whether his subsequent actions with relation thereto tend to show that he has since maintained the claim or abandoned the same.

ARID LAND—WITHDRAWAL—SETTLERS—ACT OF JUNE 17, 1902.

OPINION.

The power conferred upon the Secretary of the Interior by the act of June 17, 1902, to make the necessary withdrawals to carry into effect the provisions of the act, and to acquire rights and property for the purpose contemplated, implies the right to appropriate for irrigation purposes public lands to which the United States has the full legal and equitable title, but the inchoate rights acquired by a *bona fide* settlement made in pursuance of and in strict compliance with the public land laws should not be arbitrarily taken without compensation. In determining the compensation it should be considered with reference to the loss sustained by the settler in depriving him of his inchoate right by the arbitrary taking of lands which he had cultivated, improved and resided upon under authority of law with a view to the acquisition of the title.

The Secretary of the Interior has no authority under the provisions of the seventh section of the act of June 17, 1902, to compensate settlers upon lands within the limits of a withdrawal made in connection with an irrigation project unless they have in good faith acquired an inchoate right to the land by complying with the requirements of law up to the date of the withdrawal and have such a claim as ought to be respected by the United States.

Assistant Attorney-General Campbell to the Secretary of the Interior,
October 12, 1905. (E. F. B.)

I am in receipt by reference of a letter from the Director of the Geological Survey requesting to be advised whether persons occupying and improving public lands but who have not taken any steps to acquire title to the same under the public land laws have claims of such character as are properly subject to acquisition by purchase or condemnation under the terms of the Reclamation Act (32 Stat., 388). The letter has been referred to me for opinion upon the question submitted.

Reference is made in the letter to two particular claims: First, the claim of one Pemberton, who has occupied and cultivated a tract of land within the proposed reservoir line for fifteen years, having placed thereon substantial improvements, but who has taken no steps to acquire title to the same under any of the general land laws. The other claim is that of Sulton Bros. who purchased through an intermediate grantor the improvements of Yancy Moffatt, a settler, who improved a tract of land within the proposed area of the reservoir, and filed a preemption declaratory statement for the tract July 11, 1885, but who has taken no further steps to complete his filing, as required by the provisions of the preemption act.

It is presumed that the inquiry of the Director was prompted by the following expression in the letter of the Department of January 20, 1905, relative to lands in the Truckee-Carson project:

As the legal and equitable title is in the United States to all public lands to which a mere inchoate right has attached, there is no outstanding legal or equitable title in such lands to purchase, but, the improvements of the settlers made upon such lands under authority of the public land laws is a property right that can not be taken without compensation, which probably may include the enhanced value of the land by reason of the settler's cultivation and improvement.

That expression was made with reference to the authority conferred by the 7th section of the act of June 17, 1902, upon the Secretary of the Interior to acquire rights or property by purchase or by condemnation under judicial process and to pay for the same from the Reclamation Fund.

A mere entry of public lands by a qualified settler with a view to acquiring title under the general land laws confers only an inchoate right which, although it may be asserted against every one who has not a prior right, is no bar to the appropriation of such land by the United States. Ordinarily such appropriation can only be exercised by Congress acting directly, but the power conferred upon the Secretary of the Interior by the act of June 17, 1902, to make the necessary withdrawals to carry into effect the provisions of the act

and to acquire rights and property for the purpose contemplated, necessarily implies the right to appropriate for irrigation purposes public lands to which the United States has the full legal and equitable title.

It follows from this that a mere withdrawal of lands, for use in the construction and operation of an irrigation project, under the provisions of that act, is of itself an appropriation of all lands within the limits of such withdrawal except lands to which a vested right or interest had attached at the date of the withdrawal so as to deprive Congress of the power of disposition and control over the same. (Instructions, 32 L. D., 387. Board of Control *v.* Torrence, Ib. 472.)

So that the United States may exercise ownership and control over all lands covered by such withdrawal, irrespective of the occupancy and improvement of such lands by settlers who have not acquired a vested right thereto, although they may have made filings and entries and may have complied in all respects with the laws under which their settlements were made. In such cases there would be no property or right necessary to be acquired by the United States, as a condition to its right to appropriate the land, but it does not follow that a settler who had in all respects complied with the law up to the date of the withdrawal should be arbitrarily deprived of the fruits of his labor without just compensation.

It is more than probable that the United States may not have any use for the improvements of the settler in the construction and operation of any project, and would therefore have no object in acquiring them. Hence the compensation to the settler should not be measured by that alone but should be considered with reference to the loss sustained by the settler in depriving him of his inchoate right by the arbitrary taking of lands which he had cultivated, improved and resided upon under authority of law with a view to the acquisition of the title.

The power conferred upon the Secretary of the Interior by the 7th section of the act to acquire "rights" or property, and to pay from the reclamation fund the sum that may be required for that purpose evidently contemplated that the inchoate right acquired by a *bona fide* settler upon public lands made in pursuance of and maintained in strict compliance with the law should not be destroyed and arbitrarily taken without compensation. It is not a purchase of the land that is required, because the settler has no title to sell, nor of his improvements, because the United States may have no object in acquiring them, but it is the acquisition of the right that a *bona fide* settler had earned by complying with the law.

In the cases referred to the parties will be deprived of no valid rights under the general land laws. In Pemberton's case, he is a mere squatter who had forfeited whatever right he acquired and had

not by any act indicated a purpose to acquire title to the land for a home. He had not in any respect complied with the law and the taking of the land by the United States would deprive him of no right either legal or equitable acquired under the general land laws. Whatever improvements he has may be removed if it can be done without impairing the right of the United States.

In the case of Sulton Bros., the sale of the improvements by the settler was of itself an abandonment of the filing independently of his failure to perfect the same within the period prescribed by the statute. The statutory life of his filing had long since expired and whatever rights he acquired thereunder were by the express terms of the statute forfeited. While a settler may be permitted to complete his filing and acquire title to the land after the time for submitting proof and making payments fixed by statute, it is merely by grace of the government and not from any right that can be asserted by the settler in virtue of the inchoate right conferred by the statute.

My opinion is that the Secretary of the Interior has no authority under the 7th section of the act of June 17, 1902, to compensate settlers upon lands within the limits of the withdrawal except such settlers who have in good faith acquired an inchoate right by complying with the law up to the date of the withdrawal and have such a claim as ought to be respected by the United States. It is the right that the settler has been deprived of by the government, that is to be compensated for and not merely the intrinsic value of his improvements. A settler who has not complied with the law has no such right, and as to such settlers the improvements may be removed if in doing so it will not impair the property of the United States.

Approved:

E. A. HITCHCOCK, *Secretary*.

ARID LAND—WITHDRAWALS—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Withdrawals under the provisions of the act of June 17, 1902, in connection with irrigation projects, will be made as follows:

1. When a site has been selected with a view to making an examination and survey for the purpose of determining whether the construction of an irrigation project upon such site is practicable and advisable, a withdrawal will immediately be made of all lands believed to be susceptible of irrigation from such contemplated works, in accordance with the second form of withdrawal provided for by the third section of the act of June 17, 1902, and at the same time a preliminary withdrawal will be made of lands that may be needed for use in the construction and operation of the works, which will reserve such lands from entry of every character but will not affect entries previously made.

2. As soon as it shall be determined that the project is practicable and advisable and the construction of the same is approved and authorized by the Secretary of the Interior, a withdrawal will be made of all public lands shown by the examination and survey to be required for use in the construction and operation of the works, and all persons who may have made entry of such lands within such withdrawal prior to the preliminary withdrawal and who have not acquired a vested right thereto, will be notified of the appropriation of their lands for irrigation purposes and that their entries will be canceled and their improvements paid for by the government as provided for by the eighth and ninth sections of the circular of June 6, 1905, unless sufficient cause be shown within sixty days from the date of such notice.

Secretary Hitchcock to the Director of the Geological Survey,
(F. L. C.) *October 12, 1905.* (E. F. B.)

Referring to your letter of August 29, 1905, to the Commissioner of the General Land Office, requesting that the local officers be directed not to allow final proof to be made by Ed. Sayles upon his homestead entry for lots 1 and 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 35 N., R. 25 E., Waterville, Washington, lying within the limits of a withdrawal made for the contemplated Okanogan irrigation project, the Department approves of the views of the Commissioner as expressed in his reply thereto of September 8, 1905, that no sufficient reason has been shown why said entryman should be restrained from submitting final proof upon his entry as authorized by law, it appearing that the practicability of the project has not yet been determined by the Secretary of the Interior so as to authorize the appropriation of any lands for such purpose.

In view of the suggestions of the Commissioner of the General Land Office and of the recommendations contained in your reply thereto of September 16, 1905, it is deemed advisable to make a decisive ruling as to the effect upon existing entries of a preliminary withdrawal made by the Secretary of the Interior for the purpose of ascertaining whether a contemplated irrigation project is practicable where the lands entered may be needed for use in the construction and operation of the project.

The authority of the Secretary to make withdrawals under the act of June 17, 1902 (32 Stat., 388), and the effect of such withdrawals, was considered in the letter of the Department of February 11, 1903 (32 L. D., 6), in which, referring to the two classes of withdrawals authorized by the act, it was said:

The first withdrawal provided for by the third section of the act must be made by the Secretary of the Interior before giving notice to the public of the lands irrigable under any project that has been determined by him to be practicable and advisable, but nothing in the law prohibits a withdrawal prior to such determination, with a view to an examination of any particular locality, to obtain information to enable the Secretary to determine whether a contem-

plated project is advisable or practicable. That both withdrawals provided for by said section may be made preliminary to the examination and survey is shown by the provisions for the restoration to public entry of any lands not required for the purposes of the act, and for the restoration of the lands supposed to be susceptible of irrigation from the contemplated project, if it be determined that such project is impracticable or inadvisable.

It is obvious that the expression as to the authority of the Secretary of the Interior to make both withdrawals preliminary to the examination and survey was not sufficiently guarded as to the effect of such preliminary withdrawal upon lands needed for use in the construction and operation of the works.

The authority to withdraw lands for that purpose is given by the third section of the act which fixes the time when such withdrawals shall be made. The language is:

That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act.

To ascertain when this withdrawal shall be made we must look to the fourth section of the act, which provides that after the determination by the Secretary that the project is practicable he may cause to be let contracts for its construction and shall thereafter *give public notice* of the lands irrigable under such project, the limit of area per entry and the charges to be made per acre. This is the notice referred to in the third section and it is evident that the purpose of the statute was not to authorize such withdrawal until after the determination of the practicability of the project and to require it to be made before the notice is given.

Such withdrawals made under express authority of the statute "have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested" (Instructions, 32 L. D., 387, 388), but they must be made strictly in accordance with the legislative will and the Secretary cannot enlarge the power or infringe any provision of the act (Instructions, 33 L. D., 104). The practical effect of such withdrawals is to appropriate for use in the construction and operation of the works all public lands within the limits of the withdrawal to which the United States has the legal and equitable title. The right is also conferred upon the Secretary by the seventh section of the act to acquire for the United States by purchase or condemnation private rights or property that may be needed for the same purpose. The power and authority to appropriate public lands is coincident and coextensive with the power to acquire private property. Both are to be exercised after the Secretary has determined that a project is practicable.

The other provision of the statute authorizing the Secretary to withdraw lands "believed to be susceptible of irrigation from said works" also fixes the time for such withdrawal. He is authorized "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works" to make a withdrawal of such lands from entry except under the homestead law. So that, before or at the time the survey and examination is made with a view to determining whether the project is practicable, the Secretary withdraws from entry under authority of the statute all lands (except under the homestead law) "believed to be susceptible of irrigation from such works." Land required for use in the construction and operation of the works, and not susceptible of irrigation therefrom, cannot be withdrawn under this provision of the statute, which also requires that the "surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior *shall determine whether or not said project is practicable and advisable*, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry." The lands in one class are appropriated for use. In the other class they are withdrawn from entry under the general land laws to be disposed of under the homestead law only, subject to the conditions and limitations prescribed by Congress.

Where the power to withdraw lands is specially conferred by a particular act it must be exercised in strict conformity thereto. (Instructions, 33 L. D., 104.) The Secretary can make no withdrawals that would affect or impair entries made in pursuance of the general land laws except by special authority of Congress, which alone has the power to take away inchoate rights acquired by entries under the general land laws unless such power is specially conferred upon the executive branch of the government as in the act of June 17, 1902. (Instructions, 32 L. D., 387.)

Withdrawals of lands made prior to the determination by the Secretary as to the practicability of an irrigation project must be exercised under a different power. If it is made under his supervisory authority as a means to accomplish some end in the performance of a duty enjoined upon him, it would have the effect to withhold such lands from entry, but could not take away inchoate rights acquired under entries made prior to the withdrawal. In the instructions of February 11, 1903, *supra*, the power to make such withdrawals was sustained upon the ground that there is nothing in the act prohibiting it, and as the act authorizes the Secretary to make examinations and surveys with a view to determine whether any contemplated project is practicable and advisable, a withdrawal of lands from all

entries pending such examination was justified as a legitimate aid in the performance of that duty.

This view was also presented in the instructions of July 12, 1904 (33 L. D., 104), in which it was said that "such a withdrawal is evidently contemplated by the act, and in order to make it effective it must be an absolute withdrawal from entry of every character of all lands, whether they may be needed for construction or may be susceptible of irrigation from the works."

The instructions of June 6, 1905 (33 L. D., 607), to which you refer have reference only to the withdrawals specially provided for by the act, which have the force of legislative withdrawals, and not to preliminary withdrawals of lands that may be needed for use in the construction and operation of the works.

The Commissioner recommends that no lands embraced in a *bona fide* entry existing at date of withdrawal of lands needed for construction purposes should be appropriated for such purpose without the entryman's consent, until he has had an opportunity to have the action of the reclamation officers approved by the Department. He suggests that as soon as it is determined that entered lands are needed for use in the construction and operation of the works the entryman should be notified and advised that he will be allowed sixty days from notice in which to show cause why his land should not be appropriated for such purpose.

There is much force in this suggestion. While the only showing that could be made would be that the land was not needed for the purposes contemplated, and while the recommendation of the Reclamation Service should have such weight as to be practically conclusive of that question, the rights of a *bona fide* entryman are certainly entitled to consideration and he should be given the privilege to show that his lands should not be appropriated for such use. The special authority conferred by the act, and the general power of the Secretary to employ all the necessary means to carry the provisions of the act in full force and effect, are ample to insure the fulfillment of the purpose of the act without infringing upon the rights of entrymen, which should be protected as far as possible, and no withdrawal or use of public lands should be made without due consideration of such rights.

Hereafter withdrawals will be made as follows:

1. When a site has been selected with a view to making an examination and survey for the purpose of determining whether the construction of an irrigation project upon such site is practicable and advisable, a withdrawal will immediately be made of all lands believed to be susceptible of irrigation from such contemplated works, in accordance with the second form of withdrawal provided for by the third section of the act of June 17, 1902. At the same time a

preliminary withdrawal will be made of lands that may be needed for use in the construction and operation of the works, which will reserve such lands from entry of every character but will not affect entries previously made.

2. As soon as it shall be determined that the project is practicable and advisable and the construction of the same is approved and authorized by the Secretary of the Interior, a withdrawal will be made of all public lands shown by the examination and survey to be required for use in the construction and operation of the works, and all persons who may have made entry of such lands within such withdrawal prior to the preliminary withdrawal and who have not acquired a vested right thereto, will be notified of the appropriation of their lands for irrigation purposes and that their entries will be cancelled and their improvements paid for by the government as provided for by the 8th and 9th sections of the circular of June 6, 1905 (33 L. D., 607), unless sufficient cause be shown within sixty days from the date of such notice.

Care must be taken to confine such withdrawals strictly to lands of the character and class authorized to be withdrawn and not to embrace lands of one class in the withdrawal of lands of the other class, nor to make any unnecessary withdrawal of land, as far as it can be prevented.

OKLAHOMA LANDS—SCHOOL GRANT—ACT OF JUNE 6, 1900.

TERRITORY OF OKLAHOMA.

Under the provision of the act of June 6, 1900, relating to the opening to settlement and entry of the ceded Kiowa, Comanche and Apache lands, authorizing qualified entrymen having lands adjoining the lands ceded, whose entries embrace less than 160 acres, to enter so much of the ceded lands lying contiguous as shall, with the lands already entered, make in the aggregate 160 acres, such entrymen may make extension of their existing entries so as to include portions of sections thirteen and thirty-three within the ceded country, notwithstanding the provision of said act reserving said sections for university, agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma, and for all lands so lost the Territory must look to the indemnity provisions of its grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 12, 1905. (F. W. C.)

November 6, 1903, the attorney general for the Territory of Oklahoma called attention of this Department to the fact that under the provisions of the act of June 6, 1900 (31 Stat., 679), which act provided for the opening to settlement and entry of the ceded Kiowa, Comanche and Apache lands in the Territory of Oklahoma, particularly that provision authorizing qualified entrymen having lands ad-

joining the lands ceded, whose entries embrace less than 160 acres, to enter so much of the ceded lands lying contiguous as shall, with that already entered, make in the aggregate 160 acres, persons have been permitted to make extension of existing entries so as to include portions of sections 13 and 33 within the ceded country, which claims were allowed in plain violation of the further provision of the act of June 6, 1900, *supra*, specifically reserving sections 13 and 33 for university, agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma, citing particularly the instance of S. G. Eskew for a portion of section 33, T. 8 N., R. 17 W., and upon consideration of the matter this Department on December 5, 1903, directed your office to issue a notice in each instance where an existing entry has been permitted to be extended so as to include a portion of a section 13 or 33 within the ceded country, citing the entryman to show cause within sixty days why his entry should not be canceled, advising him that any showing filed thereunder must be served upon the proper territorial authorities.

Acting thereunder notices were issued and with your office letters of March 24, and April 12, 1905, there were forwarded showings filed by Samuel G. Eskew and Max Hill, respectively, the latter having been permitted to make an additional entry so as to extend his former entry to include lot 4 of section 33, township 8 north, range 16 west, within the ceded country. These showings appear to have been served upon the territorial authorities but no response thereto seems to have been filed.

In the act of March 2, 1895 (28 Stat., 876, 894), ratifying the agreement with the Wichita and affiliated bands of Indians in Indian Territory, and providing for a cession of certain of their lands, it was provided by article 8 of said agreement—

that whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and townsite laws of the United States. . . . : *And provided further*, That any qualified entryman having lands adjoining the lands herein ceded, whose original entry embraced less than one hundred and sixty acres, may take sufficient land from said reservation to make his homestead entry not to exceed one hundred and sixty acres in all, said land to be taken upon the same conditions as are required of other entrymen.

By the act of June 6, 1900 (31 Stat., 672, 676), ratifying the agreement made with the Comanche, Kiowa and Apache tribes of Indians in Indian Territory, it was provided by article 11:

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and town-site laws of the United States. . . . : *And provided further*, That any qualified

entryman having lands herein ceded, whose original entry embraced less than one hundred and sixty acres in all, shall have the right to enter so much of the lands by this agreement ceded lying contiguous to his said entry as shall, with the land already entered, make in the aggregate one hundred and sixty acres, said land to be taken upon the same conditions as are required of other entrymen.

In accordance with the provisions of the act of March 3, 1901 (31 Stat., 1093, 1094), the lands ceded by the agreements before referred to were opened to entry by proclamation of the President dated July 4, 1901. Said proclamation provided:

that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively, saving and excepting sections sixteen, thirty-six, thirteen, and thirty-three in each township, and all lands located or selected by the Territory of Oklahoma as indemnity school or educational lands, and saving and excepting all lands allotted in severalty to individual Indians, and saving and excepting all lands allotted and confirmed to religious societies and other organizations, and saving and excepting the lands selected and set aside as grazing lands for the use in common for said Comanche, Kiowa, and Apache tribes of Indians, and saving and excepting the lands set aside and reserved at each of said county seats for disposition as town sites, and saving and excepting the lands now used, occupied, or set apart for military, agency, school, school farm, religious, Indian cemetery, wood reserve, forest reserve, or other public uses, will, on the 6th day of August, 1901, at 9 o'clock, a. m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and town-site laws of the United States.

It was further provided:

The intended beneficiaries of the provision in the said acts of Congress, approved, respectively, March 2, 1895, and June 6, 1900, which authorizes a qualified entryman having lands adjoining the ceded lands, whose original entry embraced less than 160 acres, to enter so much of the ceded lands as will make his homestead entry contain in the aggregate not exceeding 160 acres, may obtain such an extension of his existing entry, without previous registration and without regard to the drawing herein provided for, only by making appropriate application, accompanied by the necessary proof, at the proper new land office at some time prior to the opening herein provided for.

It seems that immediately following the issue of this proclamation, your office prepared from the records, for the information of the local officers, a list of the several entries adjoining the ceded lands covering less than 160 acres where the persons were entitled to the benefit of the special provision for extension of existing entries to include lands within the ceded country, and in this list is found the names of Eskew and Hill. In accordance with notices issued to them they made extension of their existing entries through additional entries, prior to the date set for the opening of the general body of the ceded lands. The question arises now whether such entries covering portions of a section 33 within the ceded country were properly

allowed in view of that provision of the act of June 6, 1900, which provides:

That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotments under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

A reading of the statutes above quoted shows that Congress granted qualified entrymen having lands adjoining the lands ceded covering less than 160 acres, the right to extend their existing entries to include "so much of the lands by this agreement ceded lying contiguous to his said entry as shall, with the land already entered, make in the aggregate 160 acres," and without condition otherwise than that "said land to be taken upon the same conditions as are required of other entrymen." This clearly does not limit the right to any particular sections of land; that is, it did not exclude from the right any particular sections of land. It is true that the act of June 6, 1900, after providing for this special privilege reserved generally sections 16, 36, 13 and 33 of the lands acquired under the agreement made with the Indians, in each township, and provides that such lands shall not be subject to entry. This, however, under well-known rules of construction, should not interfere with the special right previously provided for. The reservation from entry should more properly be construed as a reservation from the general right of entry given in and to the reserved lands.

The proclamation reserves and excepts from the lands to be opened to entry and settlement and disposition under the *general* provisions of the homestead and town-site laws, sections 16, 36, 13 and 33 in each township, but, as before stated, the proclamation provides for the exercise of the special privilege granted existing entrymen on adjoining lands having entries covering less than 160 acres, to extend the same so as to include parts of the ceded lands "without previous registration and without regard to the drawing herein provided for only by making appropriate applications accompanied by the necessary proofs, at the proper new land office at some time prior to the opening herein provided for," thus clearly recognizing the privilege as a special one and not affected by the provisions relating to the general right of homestead entry granted within the ceded country.

The entire matter considered, it is the opinion of this Department that the extensions of existing entries so as to include a portion of the ceded lands were properly allowed notwithstanding the fact that they include portions of a section 33 within the ceded country.

There is nothing in the decision of the Department in the case of John W. Spain (31 L. D., 362), that makes against this conclusion. The land there sought to be entered was a part of a tract that had been selected by the Territory under the indemnity provisions of its grant, and the right asserted thereto was the *general* right of homestead entry and not the special privilege under consideration in this case. The provision reserving sections 16, 36, 13 and 33 within the ceded country, provides—

and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotment under this act or otherwise the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

This provision is broad enough to include any loss the State may sustain by reason of the extension of existing entries made upon contiguous lands so as to include a portion of a section 33.

The entries in question will be permitted to stand subject to compliance with law and the parties will be advised accordingly.

HOMESTEAD—INSANE ENTRYMAN—CITIZENSHIP—ACT OF JUNE 8, 1880.

EGGERT MARTENS.

It is not necessary in invoking the confirmatory provisions of the act of June 8, 1880, in instances where a homesteader has become insane, to show that such homesteader is a citizen of the United States, it being only necessary to show that he had complied with the provisions of the homestead law up to the time of becoming insane.

The case of *Fette v. Christiansen*, 29 L. D., 710, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 12, 1905.* (G. B. G.)

This is the appeal of Eggert Martens, by his guardian, John Gaedke, from your office decision of November 11, 1904, denying the right to complete Martens's homestead entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 23, T. 10 N., R. 31 W., North Platte land district, Nebraska.

This entry was allowed April 22, 1886, and the final proof offered by the said guardian therein shows that Martens fully complied with the provisions of the homestead law in the matter of residence and cultivation, and that he has valuable improvements upon the claim. It appears upon the oath of Gaedke that Martens is, and has been for some years past, an insane person, incompetent to understand or attend to business affairs of any kind, and it is shown that he (Gaedke) was duly appointed the guardian of his person and property June 17, 1903.

Martens is an alien who has not been admitted to full citizenship, for reasons which more fully appear from an order entered upon the records of the district court of Lincoln County, Nebraska. This order is in part as follows:

Eggert Martens, a native of Germany, and at present residing within said State, appeared in open court, by and through his legal guardian, John Gaedke, and made application to be admitted to become a citizen of the United States. And it appearing to the satisfaction of the court, that said Martens had declared on oath before the District Court of Lincoln County, Nebraska, a court of record having common law jurisdiction and using a seal, on April 7th, 1886, that it was *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance to any foreign prince, potentate, state or sovereignty whatsoever, and particularly to the Emperor of Germany, of whom he was heretofore a subject. The Court being satisfied from the certificates of Dr. G. A. Runstrom that the said Eggert Martens is paralyzed in both lower limbs, and by reason of which paralysis the said Martens is unable to appear in open court, and take the oath of citizenship required by law. The Court is further satisfied from the affidavits of William McMichael and John Gaedke, his witnesses, on file, and which are hereby ordered to be entered of record, and from careful inquiry of said witnesses in open court that said Eggert Martens has resided within Lincoln County, State of Nebraska, in the United States of America for the term of more than sixteen years, preceding this application, without being at any time during said sixteen years out of the territory of the United States, and that he has been within this State for sixteen years last past; and it further appearing to the satisfaction of this court, by the affidavit of said witnesses and by inquiries of said witnesses made in open court that during the said sixteen years residence, of said Eggert Martens, in this State, he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, and that he does not disbelieve in and is not opposed to all organized government, and is not a member of or affiliated with any organization entertaining and teaching such disbelief in or in opposition to all organized government, and does not advocate or teach the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or officers generally of the government of the United States or of any other organized government because of his or their official character, and has not violated any of the provisions of the act of Congress approved March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States." The Court is further satisfied from the affidavit of the witnesses on trial and inquiry made in open court that during the residence of said Eggert Martens in this County and State since the year 1886 said Martens has always been a very good man, peaceable, industrious, and law-abiding, and by his daily walk during a residence of sixteen years he has practically illustrated and emphasized his attachment to the principles of the Constitution. The Court is further satisfied that for five years or more the said Martens has been afflicted with some character of a deranged mind, in that he believes that it is unnecessary for him to appear in open court and take final oath to become a full naturalized citizen of the United States. The Court further finds as a matter of fact from inquiry of witnesses and by the records of the county court of this, Lincoln County, that by reason of the physical and mental defects of the said Eggert Martens, John Gaedke was duly appointed on June 17th, 1903, by the County Court of Lincoln County, Ne-

braska, guardian of the property and person of the said Eggert Martens, and that by reason of the mental and physical condition of said Martens said Gaedke still holds and fills said office as such guardian. The Court is further satisfied that said Martens by his daily life for ten years or more after becoming a resident of this County and State showed by his daily life that he was attached to the principles of the government of the United States and the State of Nebraska, and that in equity and good conscience he has earned all rights that full citizen is entitled to.

Whereupon it is ordered by the court that the foregoing findings be made of record.

While the order in terms declares that Martens has in equity and good conscience earned all the rights of a citizen, yet he is not legally a citizen, and the question presented by this record is, whether a person occupying this status may acquire title to public lands under the homestead law.

Section 2291 of the Revised Statutes, governing generally the question of issuance of final certificates and patents upon homestead entries, is as follows:

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

In the administration of the homestead laws the land department has uniformly held that an alien can not complete title under this section until the disability of alienage has been removed; also that an insane person, although a citizen, can not complete title thereunder, because he is not capable of taking the oath of allegiance therein required of *all* homesteaders—citizens, as well as aliens. It necessarily results that an insane alien can not complete title thereunder because he can neither become a citizen nor take this special oath of allegiance.

These conditions called for remedial legislation, and to that end Congress passed the act of June 8, 1880 (21 Stat., 166), which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required

by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirement in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties.

That this act was intended to provide a means whereby all insane homesteaders, whether citizens or aliens, might acquire title to their claims is shown by its title. The remedy according to the title is to be applied to "cases where the *settlers* have become insane." An insane alien is as much within the title as a citizen, because an alien who has declared his intention to become a citizen may have the same settlement rights upon public lands as a citizen. In the body of the act the benefits conferred are conditioned only upon a showing "by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane," and this includes an insane alien as surely as an insane citizen, because in the one case as well as in the other proof may be made that up to the time of becoming insane the alien had complied with all legal requirements. But it is mooted that because the last clause in the act specifically relieves insane persons from "the requirements in homestead entries of an affidavit of allegiance," and fails to in terms relieve such persons from proof of citizenship, therefore an insane alien is not within the remedial provisions of the act. This reasoning is contrary to all known rules applied in the construction of remedial statutes. The clause in question in nowise limits or restricts what had preceded it, but out of abundance of caution it would seem Congress endeavored to make plain that the insane homesteader being entitled to a patent by reason of the fact that he had up to the time of becoming insane "complied in good faith with the legal requirements," should not be required to do after that time what he manifestly on account of his mental condition could not do. The affidavit of allegiance and proof of citizenship required by section 2291 of the Revised Statutes are no part of the "legal requirements" which must have been complied with to entitle an insane person to the benefits of the act. The words "affidavit of allegiance" were intended to include proof of citizenship, as well as the special affidavit of allegiance required of all homesteaders—citizens and aliens alike. An alien upon making the proofs required by the naturalization laws takes an oath of allegiance. He does not become a citizen until he takes such oath. If therefore he be relieved from taking the oath, he is thereby relieved of a con-

dition precedent to citizenship, and it is inconceivable that Congress intended to relieve him of a part only of the essential conditions.

It is true that ordinarily proof of citizenship is required of all homesteaders, but where the party making entry had not become a citizen at that time, he was required, when submitting final proof of compliance with law as to residence, cultivation, or improvement, and not before, to show that he was *then* a citizen, and also to make a further affidavit of allegiance. The act of 1880 only affects cases where the homesteader became insane before making final proof, and, as he was not required, under the homestead laws, to become a citizen until he was ready to submit final proof, he might have complied in good faith with the legal requirements up to the time of becoming insane without taking out his final naturalization papers, and thus becoming a citizen of the United States. This act provides for the confirming and patenting of these claims "provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane." This clearly establishes a new rule governing the patenting of entries made by those becoming insane after the making of the original entry, and relieves the insane party from the performance of any necessary acts in further compliance with the homestead laws after becoming insane. That former provision of the act which makes it lawful for the guardian to make "the required proof" is necessarily controlled by the provision just above quoted, and its effect is merely to authorize the guardian to act for the entryman in making "the required proof" which is clearly defined in the provision taken from the act of 1880 and first above quoted. To hold otherwise, and to include within the "required proof" to be made by the guardian, acts, the performance of which in ordinary cases would occur after the entryman became insane, would nullify that provision of the act of 1880 which clearly limits the proof to a showing of compliance with the legal requirements upon the part of the entryman up to the time of his becoming insane.

These views of the act in question are in harmony with a circular issued by the Commissioner of the General Land Office, July 17, 1880, paragraph 5 of which is as follows:

The final proof must be made by a person whose authority to act for the insane person during such disability shall be duly certified under seal of the proper probate court, and no proof of citizenship, except of declaration of intention to become a citizen, will be required. (7 C. L. O., 89.)

This was a contemporaneous construction of the act, and is entitled to great weight, not only because of a general rule of statutory construction, but because made by the officer specially charged with the administration of the act. Moreover, the debates upon the bill,

which became the law in question, tend to support this construction. The bill as introduced provided that the requirement in homestead entries of "citizenship" should be dispensed with as to insane persons. The committee on public lands in the Senate reported an amendment, striking out the word citizenship and inserting in lieu thereof the words "an affidavit of allegiance." The amendment was adopted without discussion. Now, if, as hereinbefore shown, it was the intention of Congress to relieve the insane homesteader from those things which he could not do, the amendment was made upon the theory that the word citizenship as used in section 2291 of the Revised Statutes did not include the affidavit of allegiance required by the same section, but inasmuch as an oath of allegiance is the final act in becoming citizens, it was evidently believed that to relieve the homesteader from taking an oath of allegiance was also to relieve him from all proof of citizenship.

The case of *Fette v. Christiansen* (29 L. D., 710), being not in harmony with the conclusion herein reached, and being at variance with the said circular of July 17, 1880, which has otherwise been unquestioned for twenty-five years, said case will not be hereafter followed.

The decision appealed from is reversed, your office is directed to reinstate the entry in question, and inasmuch as more than seven years have expired since the entry was made the same will be referred to the Board of Equitable Adjudication for final action.

CONFIRMATION—PROTEST—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

CLARA ECKSTEIN.

Under the proviso to section 7 of the act of March 3, 1891, the filing of a protest, bringing to the notice of the government the invalidity or illegality of an entry, within two years from the date of the issuance of the receiver's final receipt, operates to suspend the running of the statute and will defeat confirmation of the entry under said provision whether the land department actually orders an investigation of the matters charged in the protest within the two-year period or not.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 16, 1905. (D. C. H.)

This case involves the homestead entry of Clara Cleghorn, now Clara Eckstein, for the SE. $\frac{1}{4}$ of Sec. 25, T. 8 S., R. 6 E., Rapid City, South Dakota, land district, and is before the Department on the appeal of said Eckstein from your office decision of February 3, 1905, denying her motion for confirmation of said entry under the proviso

to section 7 of the act of March 3, 1891 (26 Stat., 1095), which reads as follows:

That after the lapse of two years from the date of issuance of the receiver's receipt upon the final entry upon any tract of land under the homestead, timber culture, desert-land or pre-emption laws, or under this act, and where there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

It appears from the record that final proof in support of the entry in this case was made May 27, 1902, and that final certificate was issued thereon May 29, 1902; that one Charles Graves, by letter of December 11, 1902, addressed to the Commissioner of the General Land Office, called attention to said entry and asked that it be investigated, stating that claimant had never resided on the land, and that, on the day she made final proof, and several times after that date, he called the special agent's attention to the matter and that no action had been taken by him, which said letter bears evidence of having been received at your office on December 20, 1902; and it further appears that on January 20, 1903, said Graves, by letter, called the said Commissioner's attention to the fact that his first letter had not been answered, and again insisted that an investigation should be had to the end that the entry might be canceled for failure of claimant to reside upon the land, which said letter appears to have been received at your office on January 24, 1903.

No consideration seems to have been given to the subject-matter of said letters by your office until August 8, 1904, when the matter was submitted to Special Agent Wadsworth for investigation. On October 29, 1904, Special Agent Darby submitted his report charging that claimant had not complied with the law in the matter of residence and recommending that the entry be canceled, whereupon your office, by letter "P" of November 14, 1904, suspended the entry, and directed the local officers to allow the usual time within which to apply for a hearing. Claimant, on January 16, 1905, filed a motion for confirmation of the entry, alleging as grounds therefor that more than two years from the date of the final receipt having elapsed before the proceedings now pending against the entry were commenced, the entry was confirmed and that patent therefor should issue under the proviso to section 7 of the act of March 3, 1891, *supra*. Claimant at the same time filed an application for a hearing and asked that same be considered without prejudice to her said motion for confirmation of her entry.

Your office, by decision of February 3, 1905, aforesaid, denied claimant's motion for confirmation of the entry, but granted the application for hearing. While no reason is given in said decision for denying the said motion, it appears by reference to letter "P" of

December 10, 1904, that your office considered the action taken by Graves in the nature of a pending protest against the entry, and held that, as such, it was sufficient to defeat confirmation of the entry under the aforesaid proviso. Claimant has appealed from your decision of February 3, 1905, in so far as it denies her motion for confirmation of the entry, and in said appeal alleges practically the same grounds as are set forth in her said motion.

It is clear from the record that at the time your office ordered the investigation of the entry in question to be made (August 8, 1904) more than two years from the date of the final certificate (May 29, 1902) had elapsed, and the question for determination is, whether or not the action taken by Graves in the matter, and the mere filing of his said letters in your office, can be considered as a pending protest against the entry in question, or is such a proceeding as will except the entry from the confirmatory operation of the proviso to section 7 of the act of March 3, 1891. In the instructions of July 9, 1902 (31 L. D., 368), it is said that—

the purpose of this statute is to protect the entry against any adverse proceeding after the lapse of two years from the date of the receiver's receipt upon final entry, whether such proceeding was instituted through individual efforts, or by the government through its appointed agents.

And further on in said instructions it is held that—

the word contest is technically applied to proceedings against entries instituted by persons seeking to acquire a preference right of entry under the act of May 14, 1880—

and that—

the word protest has a broader signification and is applied indiscriminately to every proceeding against an entry, whether initiated by an individual in defense of his own right or as a friend of the government, or whether it is initiated by the government through its trusted agent.

These instructions clearly recognize the right of an individual to initiate proceedings against an entry at any time within two years from the date of the final certificate issued thereon, and the proceedings can be initiated either by regular contest, or by way of protest, which latter mode is simply the calling of the attention of the government to the invalidity of the entry and asking that the matter be investigated, with a view to the cancellation of the entry.

In the case at bar, it appears from the record that the protestant, Graves, on the day the claimant made her final proof, and several times thereafter, called the attention of the special agent to the entry in question and that the said agent took no action in the matter, and that by letter of December 11, 1902, Graves brought the matter to the notice of the Commissioner of the General Land Office, stating that claimant had never resided on the land covered by her entry

and asking that an investigation be had, and that the entry be canceled, and that on January 20, 1903, he again by letter called the said Commissioner's attention to the entry, repeating the charges made in his first letter and insisting that an investigation be had and offering to furnish the necessary testimony to secure the cancellation of the entry, and that said letters were received and filed in your office, marked, "for investigation," within eight months from the date of claimant's final certificate. The protestant having within the prescribed time, done all that was in his power to do, can it be said that he did not initiate a proceeding against the entry in question and that there was no pending protest against its validity at the time the final certificate was issued, simply because your office did not act promptly in the matter, and order the investigation of the entry before the lapse of two years from the date of the issuance of said certificate? The act clearly gives to the individual the right to initiate proceedings against an entry by way of protest, and after the individual has done all he possibly can to make his protest effective, to hold that it avails nothing because the officials of the government, through inadvertence, or otherwise, fail to take immediate action thereon, would rob the statute of its spirit and substance, and render it, to a certain extent, ineffectual.

The instructions of July 9, 1902, hereinbefore referred to, appear to warrant the holding that in cases of protests against entries under the act in question, it is not absolutely essential that your office shall within two years from the date of the final certificate actually order an investigation of the matters charged in the protest, in order that the running of the statute may be arrested, for in said instructions (31 L. D., 371) it is in effect said, that a protestant may, by bringing to the notice of the government the invalidity or illegality of an entry, suspend the running of the statute and defeat the confirmation of the entry.

From a careful examination of the record and the matters presented for consideration by the appeal, the Department is of the opinion that the action taken by Graves constituted a protest against claimant's entry and said protest having been filed in your office within two years from the date of the final receipt it was a *pending protest* against the validity of said entry within the meaning of the statute and when acted upon as hereinbefore stated, operated to defeat the confirmation of the entry under the proviso to section 7 of the act of March 3, 1891, notwithstanding the fact that no action looking to the suspension or cancellation of the entry was taken by your office until after the lapse of two years from the issuance of the final receipt. The judgment of your office is accordingly hereby affirmed.

UINTAH CEDED LANDS—DISPOSITION AFTER EXPIRATION OF "SIXTY-DAY PERIOD."

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 16, 1905.

REGISTER AND RECEIVER, *Vernal, Utah.*

GENTLEMEN: It was provided by act of Congress, approved May 27, 1902 (32 Stat., 263), among other things, that on October 1, 1903, the unallotted lands in the Uintah Indian Reservation, "shall be restored to the public domain: *Provided*, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre."

By various acts of Congress the time for the opening of said unallotted lands was extended from time to time, and by act of Congress approved March 3, 1905 (33 Stat., 1069), said time was again extended to not later than September 1, 1905, which last named act, among other things, provided:

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May 27, 1902, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry—

and by proclamation of the President, dated July 14, 1905, after providing for the manner in which these lands might be settled upon, occupied, or entered during the sixty-day period, it was further provided:

After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy and entry had not been prescribed herein in obedience to law.

According to said proclamation, this period of sixty days began on August 28, 1905, and, as a consequence, will expire at midnight of October 26, 1905. Thereafter all unreserved non-mineral lands which have not been entered on the plan provided for in said proclamation may be settled upon, occupied and entered under the general provisions of the homestead and townsite laws of the United States.

While these lands will become subject to settlement immediately after midnight of the 26th of the month, it will not be possible to

make entry thereof until the opening of your office on the morning of the 27th of this October.

It may, and possibly will occur, that on the opening of your office on October 27, next, a number of persons will have assembled at the office seeking to make entry for the lands remaining undisposed of, and the duty will devolve upon you to make and enforce such rules and regulations as may be necessary to secure a fair and orderly course of proceedings on the part of all concerned. The transmission of applications by mail is permissible, but such applicants should not be given superior rights thereby.

You will, therefore, upon opening your office on October 27, 1905, note the number of persons in line, and act upon their applications in order of presentation. After acting upon all applications of those who were in line at the opening of your office, you will act upon all applications received by you by mail on that morning in the order in which you may happen to open them, and then proceed with the applications of those who have formed in line after the opening of your office. Any applications received in subsequent mails should be considered in the actual order of arrival, after all applications of those who are in line at date of their receipt have been acted upon. (See 27 L. D., 113, and 33 L. D., 582.)

Such of the persons present who may be acting as agents of ex-soldiers under section 2309, Revised Statutes, will be allowed to make one entry in his individual character, and to file one declaratory statement as agent, if properly authorized, and if desiring to make other filings you will require him to take his place at the end of the line and await his proper turn before doing so, and he will be allowed to file but one declaratory statement at a time.

After the disposition of applications presented by persons present at 9 o'clock a. m., which should be proceeded with at once, all other applications presented will be disposed of in the usual way, the time of actual presentation being duly noted on the application.

You are expected to act promptly under the lawful instructions before you as occasions arise, allowing any parties feeling aggrieved by your action the right of appeal, under the Rules of Practice, without seeking special instructions from this office in the particular cases before acting thereon.

After said sixty-day period you will continue to number the entries consecutively in the "Utah Indian series."

Your attention is also called to the instructions of the Department of June 13, 1905 (33 L. D., 610), to the effect that the provisions of the act of May 27, 1902, *supra*, requiring the payment by persons entering said lands of \$1.25 per acre, is not repealed by the provisions

in the act of March 3, 1905, aforesaid, "that the said unallotted lands [with certain stated exceptions] shall be disposed of under the general provisions of the homestead and townsite laws of the United States;" but that payment should not be exacted until the offer of proof in final consummation of the entry. You will be governed accordingly.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

HOGAN AND IDAHO PLACER MINING CLAIMS.

Motion for review of departmental decision of July 19, 1905, 34 L. D., 42, denied by Secretary Hitchcock, October 17, 1905.

COAL LAND—SECTIONS 2347 TO 2352 OF THE REVISED STATUTES.

McKIBBEN v. GABLE.

- A "preference right of entry" under section 2348 of the Revised Statutes arises where any person or persons, severally qualified to enter, have opened and improved any coal mine or mines upon the public lands, and are in actual possession of the same; and such right accrues only to the person or persons who have so opened and improved such mine or mines, and have the possession thereof.
- A "preference right of entry" under section 2348 of the Revised Statutes is not created, or initiated, by the filing of a declaratory statement under section 2349. The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose.
- It is not in all cases essential to the validity of an application to purchase coal lands, or to the completion of proceedings thereunder, that the applicant show that he had actually opened and improved a mine of coal on the lands applied for. This is necessary only where the applicant asserts a preference right of entry under the statute and must maintain his assertion or suffer defeat in favor of another applicant or claimant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 18, 1905. (A. B. P.)

This is a controversy between S. S. McKibben and Thomas P. Gable, each asserting claim to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and lots 3 and 4, Sec. 28, T. 13 N., R. 6 E., Santa Fe, New Mexico, as coal lands.

The laws providing for the disposal of the coal lands of the United

States are contained in sections 2347 to 2352, inclusive, of the Revised Statutes.

July 26, 1902, Gable filed, under section 2349, a declaratory statement for the lands, accompanied by certain affidavits, all of which were in regular form except that the receiver before whom the affidavits were verified, had failed to enter his official certificate or jurat thereon. May 11, 1903, McKibben filed, under the same section, a declaratory statement for the lands, also in regular form, and sworn to by himself. August 5, 1902, two other persons filed a joint declaratory statement for the same lands.

May 16, 1905, Gable filed with the register his application, under oath, dated May 11, 1903, to purchase the lands as coal lands, and accompanied the same by the affidavits of two other persons, sworn to May 12, 1903, wherein it is set forth, amongst other things, in substance and effect, that the lands are chiefly valuable for coal and otherwise subject to disposal under the coal land laws. At the same time he made tender of the purchase money at the price of twenty dollars per acre, the lands being within fifteen miles of a completed railroad. The local officers suspended action upon his application, and the conflicting claimants of record were cited to appear, July 13, 1903, and show cause, if any they could, why the application should not be allowed.

On the day named McKibben appeared, by his attorneys, and filed what he terms a protest against Gable's application to purchase, sworn to by himself and corroborated by two witnesses. The protest is chiefly an attack upon Gable's declaratory statement. - It contains no assertion of right in McKibben himself other than as claimant under his declaratory statement. It is charged, in substance, that the application to purchase should be rejected for the reason that prior to its filing no coal mine, or coal of merchantable value, or of any value, had been opened, exposed, or developed on the lands, and no improvements had been made thereon, by Gable or in his behalf. Gable appeared in person and by attorney. The other claimants did not appear, and are out of the case. Both the contending parties submitted evidence.

Presumably upon the theory that McKibben's protest and declaratory statement, taken together, were sufficient to raise the issue of the character of the lands, evidence was introduced by both parties relating to that question, as well as to the matters specifically charged.

September 30, 1903, the local officers found for Gable and recommended that his application to purchase be allowed and that McKibben's protest be dismissed.

Upon appeal by McKibben, your office, by decision of April 19, 1904, affirmed the action below, and gave direction to the local officers,

amongst other things, that before finally accepting Gable's application and proofs, evidence of the authority of the agent who filed the same should be furnished as required by rule 34, Rules of Practice. McKibben filed a motion for review, which was denied May 31, 1904, and he thereupon appealed to the Department. His counsel have filed elaborate briefs in his behalf, and, in addition, have referred to the briefs filed when the record was before your office, all of which have been carefully considered.

The provisions of the coal land laws that need be specially referred to are as follows:

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. [In part.] Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved.

SEC. 2349. [In part.] All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor.

It is further provided, by section 2350, that all persons claiming under section 2348 shall prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their claims, and that failure to do so shall render the lands subject to entry by any other qualified applicant; also, by section 2352, that nothing in the preceding sections shall authorize the sale of lands valuable for mines of gold, silver or copper.

By section 2348 "a preference-right of entry" is provided for. This right arises where any person or persons, severally qualified to enter, have opened and improved any coal mine or mines upon the public lands, and are in actual possession of the same. The right accrues only to the person or persons who have *opened* and *improved* the mine or mines, and have the possession thereof. Once acquired, the right may be preserved and continued, by filing a declaratory statement under section 2349, until the expiration of the time within which proof and payment must be made under section 2350. The right is not created, or initiated, by the filing of a declaratory state-

ment. It is acquired only by opening, improving, and having possession of, a mine or mines of coal on the public lands. In the absence of either of the required conditions, there is no preference-right of entry under the statute. The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform, and is without force or effect for any purpose.

McKibben made oath in his declaratory statement that he had "located and opened a valuable mine of coal on the lands," but in this he is not sustained by the evidence, and it is admitted in the briefs of his counsel that such was not the fact. Through his counsel he asserts that neither he nor Gable ever opened a mine of coal on the lands, or discovered any coal of value thereon; and he contends that not having himself applied to purchase, he was not required to show at the hearing that he had opened a coal mine or discovered valuable coal on the lands.

Under the conditions thus admitted, as well as shown by the evidence, it is clear that McKibben's declaratory statement was filed without authority of law, having no basis to rest upon, and can avail him nothing in this case. He obtained no preference right of entry and therefore his declaratory statement had no office to perform, and was, so far as this record shows, without legal force or effect. It follows that McKibben has no valid claim to the lands in controversy.

By section 2347 it is provided that any person possessing the necessary qualifications may, upon application to the register of the proper land-office, purchase and enter not to exceed one hundred and sixty acres of vacant coal lands of the United States. All that is required of an applicant to purchase is that he shall show himself qualified to enter, shall show that the lands applied for are of the character subject to sale, and shall pay the government price therefor.

Are the lands in controversy of the character subject to sale under the coal land laws? If they are, McKibben's declaratory statement being out of the way, there would appear to be no obstacle to the completion of Gable's purchase. It is not in all cases essential to the validity of an application to purchase coal lands, or to the completion of proceedings thereunder, as contended by counsel for McKibben, that the applicant must show that he had actually opened and improved a mine of coal on the lands applied for. This is necessary only where the applicant asserts a preference right of entry under the statute and must maintain his assertion or suffer defeat in favor of another applicant or claimant. In such a case, to establish his claimed preference right of entry, the applicant would have to show that he had opened and improved a mine of coal on the lands, and was in actual possession of the same.

This is not a case of that kind. To sustain his application to

purchase, in the absence of any lawful claim by McKibben, Gable is not bound to rely upon his declaratory statement, and is therefore not required to show the existence of a preference-right of entry under it. He may rest his claim upon his application to purchase irrespective of any question of right under his declaratory statement, and it is therefore unnecessary here to consider whether his declaratory statement was a valid one or not. His application and proofs are on their face regular, and, amongst other essential matters, show the lands to be chiefly valuable for coal. The evidence taken at the hearing not only fails to overcome the showing thus made, but tends strongly to sustain it. Upon the entire record the Department is clearly of the opinion that the lands are shown to be of the character subject to sale under the coal land laws. The decision of your office dismissing McKibben's protest and holding his declaratory statement for cancellation is accordingly affirmed. Gable will be allowed a reasonable time within which to complete his purchase in accordance with the directions given in your said decision.

MINING CLAIM—STATUTE OF LIMITATIONS—SECTION 2332, R. S.

THE LITTLE EMILY MINING AND MILLING CO.

The main purpose of section 2332 of the Revised Statutes is to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim," and there is no authority for restricting the application of the provisions of said section to such cases only in which the applicant for patent is unable by reason of the lapse of time or the loss of mining records by fire or otherwise to furnish the proof of possessory title required by the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 18, 1905.* (G. J. H.)

August 9, 1904, The Little Emily Mining and Milling Company (hereinafter called the company) made mineral entry No. 311 for the Laura and Eureka lode mining claims, Independence land district, California.

It appears from the record that on May 13, 1904, application for patent for the above-mentioned lode claims was filed on behalf of the company, in support of which evidence was furnished showing that on January 28, 1884, it acquired, through mesne conveyances, the title of some of the original locators and had been in open, notorious, continuous and exclusive possession of said claims and worked the same

from that time up to the date of the filing of the application, with the exception of a short period in 1893, when certain persons (not claiming under any of the original locators) entered upon and took possession of a portion of the claims here in question, whereupon the company instituted an action in ejectment against said persons, in the Circuit Court of the United States, Ninth Circuit, Northern District of California, and that court, on January 23, 1896, rendered judgment in said action awarding the exclusive right of possession and enjoyment of the land embraced in the claims here in question to the company. Since the termination of said suit and until the filing of the application for patent, a period of about eight years, and more than equal to the time prescribed by the statute of limitations for mining claims (real property or possession thereof) of the State of California (five years—secs. 318 and 319, Civil Code of Procedure), the company is shown to have held and worked the claims and appears to have in all respects complied with the requirements of the mining laws.

Upon consideration of the application and the showing made to support the same, entry was allowed by the local officers. When the matter came in due course before your office, it was found and held, in decision of March 2, 1905, among other things, as follows:

It would appear that the applicant desires to base its possessory title to said claims under the provisions of section 2332 of the United States Revised Statutes. . . .

The statute of limitation provides for cases in which applicants are unable to furnish, by reason of the lapse of time or the loss of mining records by fire or otherwise, the proof required to support their possessory title to mining claims under section 2325 of the Revised Statutes, and can not be invoked to cure the defects in title as in this case. Applicant will therefore be allowed sixty days from receipt of notice in which to show cause why said entry should not be canceled by reason of failure to show complete title in applicant at date of application for patent. See decision of the Department of December 30, 1904, *Hubbard R. Sherer v. C. C. Koenneker et al.*, unreported. See also *Barklage et al. v. Russell*, 29 L. D., 401.

From the decision of your office the company has appealed.

From an examination of the record the applicant appears to have furnished all the proof required by section 2325 of the Revised Statutes, showing compliance with the mining laws, notice of the application was posted and published, and no adverse claim or protest has ever been filed. The only question presented by the appeal is whether the facts shown by the record present such a case as comes within the remedial provisions of section 2332 of the Revised Statutes.

Said section reads as follows:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be

situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The existing official regulations under said section (31 L. D., 487) are as follows:

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

All the evidence required under these regulations has been furnished by the applicant.

There is nothing in the language of the statute to indicate that Congress intended to restrict the application of its provisions to cases where the applicant for patent is unable by reason of the lapse of time or the loss of mining records by fire or otherwise to furnish the required proof of possessory title, nor do the regulations above quoted so construe said section. They state merely that the provisions of that section "will greatly lessen the burden of proof, *more especially* in the case of old claims located many years since," etc.

In the case of *Barklage et al v. Russell* (29 L. D., 401), cited to

support your decision, it was said, in reference to said section (pp. 405-406):

One purpose of section 2332, as indicated in paragraph 76 [now 74] of the foregoing regulations, and clearly shown in the history of the proceedings in Congress attending its consideration and passage there, was to lessen the burden of proving the location and transfers of old claims concerning which the possessory right was not controverted but the record title to which had in many instances been destroyed by fire or otherwise lost because of the insecurity and difficulty necessarily attending its preservation during the early days of mining operations upon the Pacific Coast and vicinity. As originally enacted, the section was intended, primarily, if not solely to apply to placer claims, for the patenting of which there had previously been no provision, and to which class all, or nearly all, of the earlier claims belonged, the establishment of record title to which under the original locations and through successive transfers was especially difficult and oftentimes impossible for the reasons just stated.

The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being *in pari materia* with the other sections of the revision concerning such claims is to be construed together with them, and so as, if possible, that they may all stand together, forming a harmonious body of mining law. . . . Properly construed with section 2325 and other sections of the Revised Statutes upon the same subject, it is believed that the main purpose of section 2332 was to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim."

In the present case the applicant, as before stated, appears to have complied in every particular with the requirements of the mining laws and the regulations issued thereunder, and has held and worked the claims for a period equal to and exceeding the time prescribed by the local statute of limitations for mining claims. The decision in that case furnishes no authority for the conclusion reached by your office in the decision appealed from.

The judgment of the court in the ejectment proceeding hereinbefore mentioned awards "the exclusive right of possession and enjoyment of all the land and surface included within the exterior lines of said locations" to the company, and further holds that—

on the 8th day of February, 1893, and ever since said date, said plaintiff was the owner of and entitled to the possession of and is now the owner of and entitled to the possession of said above-described lands, mining claims and locations and premises and of each and every portion thereof and is entitled to recover possession thereof from said defendants.

Since the judgment of the court awarding to the company the exclusive right of possession and enjoyment of each and every portion of the mining claims in question, it has held and worked said claims in accordance with the mining laws; no one else appears to

have asserted any right or attempted to exercise any claim whatever thereto; no adverse claim was filed during the period of publication of notice of the application for patent; and no objection, by protest or otherwise, is being made before the land department to the issuance of patent to the company as applied for.

After careful consideration of the matter, the Department is of opinion that the company is entitled to invoke the remedial provisions of section 2332 of the Revised Statutes, and, unless other objection appear, the entry will be carried to patent.

Your office decision is reversed.

RAY *v.* SHIRLEY.

Motion for review of departmental decision of July 17, 1905, 34 L. D., 30, denied by Secretary Hitchcock, October 17, 1905.

ARID LAND—IMPERFECT TITLES—ACT OF JUNE 17, 1902.

OPINION.

The act of June 17, 1902, contemplates that the United States shall be the full owner of irrigation works constructed thereunder, and clearly inhibits the acquisition of property, for use in connection with an irrigation project, subject to servitudes or perpetual obligation to pay rents to a landlord holding the legal title thereto.

Assistant Attorney-General Campbell to the Secretary of the Interior,
October 19, 1905. (J. R. W.)

There are informally referred to me the two letters of the Director of the Geological Survey of September 8, 1905, concerning the acquisition of leasehold or possessory rights of George E. Shute, in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 36, T. 4 N., R. 13 E., G. & S. R. M., Arizona, proposed to be acquired under the act of June 17, 1902 (32 Stat., 388), in connection with the Salt River project; also of the rights of Henry E. Kester and Lawrence E. Karr and wife to lands in section 36, township 16 south, range 21 east, S. B. M., Arizona, proposed to be acquired under the same act in connection with the Yuma project.

The title and rights of George E. Shute were subject of departmental instructions of May 10, 1904 (32 L. D., 604). The land is reserved by section 2 of the act of February 24, 1863 (12 Stat., 664, 665), to be granted for school purposes to the future State to be erected, including such land within its boundaries. All power of the Territory over it is restricted by the act of April 7, 1896 (29

Stat., 90), to temporary leasing for terms not longer than five years, but to terminate in any event upon the admission of the future State to which title shall be granted. Under this condition of title the Director of the Geological Survey was instructed (32 L. D., 604) :

Your office will therefore confer with the present holder of the leasehold and with the proper local authorities, in the event that acquisition of the possessory right and improvements is necessary to prosecution of the irrigation project, and will report at what price they can be obtained. In such case, however, prior to reporting the matter to the Department for approval, it will be necessary that the Board of Supervisors, or other proper territorial authorities, consent to the purchase, waiving further payment of rent and agreeing not in future to make a lease of the same land during the period of territorial existence. When the matter is presented in such form the Department will consider the advisability of such purchase in each particular case.

The Director now reports that:

A copy of your letter of May 10, 1904, was sent to the Supervising Engineer of the Salt River project for his guidance, and he has reported that he has been unable to carry out your instructions as the Board of Supervisors deny that they have the power to consent to the purchase of the lease and to waive further payment of rent and to agree not in future to make a lease of the same land during the period of territorial existence.

In the meantime Mr. Shute has sold his leasehold and some personal property to J. E. Sturgeon for \$4,000. The lease will expire next year and will probably be renewed from time to time, but sooner or later this property will have to be acquired for the Salt River project.

* * * * *

It is thought that possibly the requirement that the Board of Supervisors should waive further payment of rent could be met by adding to the purchase price of the leasehold the estimated rental which would have accrued to the Territory had the United States not purchased the rights of the lessee; it is not believed, however, that the county supervisors have power to agree not in future to make a lease of the same land during the period of Territorial existence. . . .

I respectfully request that I may be advised as to what action should be taken by this office in order to secure the land for the project. Information is also desired as to what, if anything, should be done relative to the two sections which are unimproved and unleased and in respect to which no negotiations have been begun, and also in regard to the two tracts adjoining the leasehold of George E. Shute, leases on both of which expired on April 4, 1904, and possession being in the United States, as stated above.

The territorial authority has control of the land until the coming into existence of the future State to which Congress has declared its intent to grant the title and for benefit of which the land is reserved. Whether or not the law of Arizona now authorizes the State and local authorities to waive payment of rents and to undertake not to make further leases, such legislation is within the power of the territorial authority. It is also within power of Congress, notwithstanding its reservation of these lands, to authorize other disposal of them, if it shall see fit so to do. It is not the intent of the irrigation act to

authorize the acquisition of imperfect titles and to subject the public works to be constructed to uncertain and unascertainable burdens for rents in perpetuity, liable every five years to be increased by reappraisals of the land. The law contemplates that the United States shall be full owner of the works when completed, and that the entire cost of the work shall be imposed on the land benefited, and shall be reimbursed to the Treasury by the future owners of the land reclaimed, ratably to the whole area reclaimed.

I am of opinion that these plainly expressed purposes clearly inhibit the acquisition of property subject to servitudes or perpetual obligation to pay rents to a landlord holding legal title thereto. No power has been delegated to the Secretary of the Interior to impose such obligations upon the United States, or subject the United States or an irrigation project to such liabilities.

I therefore recommend that the matter be submitted to Congress, which has plenary power in the premises to authorize appropriation of such lands to the purposes of an irrigation project.

The Director states that:

In the construction of the Yuma dike, contract for which has recently been awarded, it will be necessary to cross section 36, T. 16 S., R. 21 E., S. B. M., Arizona, the same also being school land, lease for which is held by Henry E. Kester, and Lawrence E. Karr and wife.

Whether work shall be begun or prosecuted upon any project which requires for its completion land to which title can not be obtained under existing law is a question which should receive consideration. While the conditions might in some instances justify preliminary work, yet a general disregard of such obstacles might involve great embarrassment and possibly subject the government to large pecuniary loss.

Approved:

E. A. HITCHCOCK, *Secretary*.

PRIVATE CLAIM—SURVEY.

COUTS *v.* STRICKLER ET AL. (ON REVIEW).

(RANCHO BUENA VISTA.)

It is within the power of the land department at any time to re-trace any surveys it has made whenever it becomes necessary to the determination of a question pending before it for its decision involving rights in public lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 25, 1905. (J. R. W.)

J. W. Strickler and others, protestants, in *Couts v. Strickler et al.* (31 L. D., 446), filed a motion for review of departmental decision of

August 10, 1905 (34 L. D., 67), approving the resurveys in connection with the boundaries of Buena Vista Rancho and plats thereof executed by Deputy Surveyor W. A. Sickler under contract No. 226, of November 21, 1903.

It is asserted that the lands claimed by protestants were not included in the Hays survey. This question of fact was fully considered and the precise point decided upon consideration of the evidence is that the lands involved were included within the lines of the Hays survey upon the ground, referred to in the deed by which Coutts purchased. The evidence of agreement of the topographical features of the ground, as given in the field-notes of Hays and of Sickler, shows that each traversed the same lines. It is in the highest degree improbable that Hays could have fabricated field-notes which would agree with notes of the actual survey of a piece of land about a half century afterward, bounded by lines of seven and a half miles. This agreement of topographical features proves that Hays and Sickler actually surveyed the same piece of land, or that Sickler merely copied Hays's notes. But the inspection of Sickler's survey shows that he made his notes from the face of the land, and necessarily proves that Hays did also.

It is also contended that "there never was at any time any question about the size of the grant or its boundaries." The grant and the decree of the court confirming it were "to the extent of one half of a square league of land, a little more or less," followed by an act of juridical possession giving courses, distances and monuments, describing one quarter of a square league. The words of the grant in themselves raised a question whether the grant was intended to be for one-half or for one-quarter of a square league. One can not intelligently read the statements of facts in the many reported decisions (cited in 31 L. D., 447) or consider intelligently the fact that the final delimitation of the grant was not effected until after six different surveys were made for that purpose, without perceiving that "the size of the grant and its boundaries" were always a question until the survey was finally approved.

Protestants present two contentions of law:

(1) That the re-tracing of the Hays survey by Sickler was without authority of law and illegal, because not made by request of the grant claimant as required by section 6 of the act of July 1, 1864 (13 Stat., 332, 334), and that it was approved contrary to the provisions of section 7 of that act because it does not follow the decree of confirmation which "designates the specific boundaries of the claim."

(2) That under section 8 of the act of July 23, 1866 (14 Stat., 218, 220), if a Mexican grant claimant fails within ten months from the decree of confirmation to request the surveyor-general to survey the

grant, he waives right to purchase land subsequently excluded from it, and all land not included in such grant when surveyed becomes "subject to the general land laws of the United States," open to entry by *bona fide* settlers like other public lands.

It would be a novelty to hold that the land department is deprived of authority to survey a Mexican grant claim by the act of 1864, *supra*, until requested by the grant claimant. The survey of such claims was necessary for their segregation from the body of the public lands in order to ascertain and survey the public lands, and the power to survey private land claims mingled and lying undefined among public lands is incident to the general work of surveying the public lands. The act of 1864 is to be construed in connection with other prior legislation for surveys of public lands in California. Section one of the act of 1864 makes reference to section 13 of the act of March 3, 1851 (9 Stat., 631, 633), which evidently contemplates a survey of such grants as of course, in the progress of the public surveys. No request of the claimant was necessary. The survey of the public lands was directed by Congress, and the survey of the private lands mingled among them was necessary to that end. The act of 1864, as to survey of lands granted by the former sovereign, was merely supplementary to the act of 1851, and section 6 of the act of 1864 merely provided how a Mexican grant claimant might obtain a survey of lands confirmed to him in advance of the survey of the surrounding public lands, and it was by section 6 of the act of 1864 made the duty of the surveyor-general to survey a confirmed grant, whether the surveys had reached the surrounding public land or not, whenever the claimant made a request therefor and deposited the cost of a special survey.

The point made is, however, immaterial, as Sickler's survey here in question was not a survey of the grant. A survey of the grant had been made by Rice, and was finally approved. The work Sickler was to do was to ascertain and fix upon the ground, and to re-trace an erroneous survey made in 1858 by Hays, before the act of 1864 was passed, referred to in the deed under which Coutts purchased in 1866, and at that time standing in credit approved by the surveyor-general, though not yet finally accepted and approved by the land department. It is within the power of the land department at any time to re-trace any surveys it has made whenever that becomes necessary to determination of a question pending before it for its decision involving rights in public lands.

This also practically disposes of the second contention. The confirmation of this grant was not made until April 14, 1879. At that time Hays's survey was still in full credit and remained so until May 27, 1884 (31 L. D., 447-448). In 1879 Coutts had no occasion

to request a survey of this claim, for one had been made twenty-one years before and was yet in credit. His failure to request a survey within ten months after the decree of confirmation could have no further effect than to waive right to purchase any land not within the lines of the Hays survey. But he had nothing to waive as to such land, for his deed made reference to that survey and his claim was by that reference confined to lands within those lines. When that survey was finally rejected and another one made and finally approved against his contention, he seasonably applied to purchase under the act of 1866 the land included in the lines of his original purchase and excluded from the survey of the grant as finally approved. The adverse claimants assert no right of earlier origin than July 23, 1866, nor any prior to Cout's purchase, November 28, 1866. The settlers entered upon the land June 21, 1886, with prior notice of Cout's claim, and were warned by him of it before they made any improvements. They obtained no right adverse to his right to purchase under the act of 1866, *supra*. *Jacks v. Belard* (30 L. D., 345); *Watriss v. Reed* (99 Cal., 134).

The several contentions of fact and law therefore present no reason to recall, vacate, or modify said decision, which is adhered to, and the motion is denied.

TIMBER AND STONE ACT—APPLICATION TO PURCHASE—EFFECT OF EXECUTIVE WITHDRAWAL.

HATTIE E. BRADLEY.

Where an applicant to purchase under the act of June 3, 1878, fails to submit proof on the day fixed therefor in the published notice, or within ten days thereafter where prevented by accident or unavoidable delay from submitting it on the day set therefor, a withdrawal theretofore made for forestry purposes, embracing the land, thereupon immediately attaches and becomes effective as to such land, regardless of the fact that the applicant, within the ten-day period after the date fixed in the notice, may have filed application to readvertise notice of intention to submit proof. An executive order reserving lands for a specific public purpose has the same effect, as against an application to purchase under the act of June 3, 1878, as an adverse claim of a private individual.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 25, 1905.* (E. P.)

On or about November 1, 1902, Hattie E. Bradley filed in the local office an application to purchase under the timber and stone act the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, T. 21 S., R. 14 E., Lakeview land district, Oregon, her sworn statement being

executed before A. C. Palmer, formerly a United States Commissioner, but whose term had then expired. Becoming aware that Palmer was not qualified to act in such matters, Mrs. Bradley, on or about February 14, 1903, filed a second application to purchase the same land, which application was executed before A. A. Bell, United States Commissioner, whose office, it appears, was located at Prineville, Oregon, a town outside the limits of the land district wherein the land applied for is situated. Thereafter notice for publication was issued, fixing December 14, 1903, as the date for the submission of proof, J. M. Lawrence, United States Commissioner at Bend, Oregon, being the officer designated before whom proof should be submitted. The town of Bend, it appears, is outside the Lakeview land district.

Before the time set for the submission of proof, to wit, July 31, 1903, the land applied for, together with other tracts, was withdrawn for forestry purposes, said withdrawal being, by the terms thereof, subject to claims theretofore properly initiated, provided the settlers or claimants should continue to comply with the law under which their settlements or claims were initiated.

Mrs. Bradley failed to appear December 14, 1903, at the place designated in the notice, and submit proof, but on December 30, 1903, filed in the local office an affidavit, executed by herself, December 22, 1903, at Spokane, Washington, in which said affidavit it was alleged that owing to personal illness, she was unable to submit proof at the date set, wherefore she asked that she be allowed to readvertise and that her final proof be ordered to be taken before the United States Commissioner at Prineville, Oregon.

The application to readvertise was transmitted to your office, and upon consideration thereof your office, by decision of August 24, 1904, directed that in the absence of any adverse claim to the land, the applicant be allowed to complete her purchase. New notice accordingly issued October 5, 1904, setting December 31, 1904, as the date for the submission of proof, and naming Prineville, Oregon, as the place where, and the county clerk of Crook county, Oregon, as the officer before whom, the proof should be submitted.

The proof was taken January 2, 1905, by the officer designated and at the place named, your office having, however, in the meantime, to wit, on November 9, 1904, instructed the local officers to "take no further action in timber and stone cases where this office has allowed readvertisement on application after date of withdrawal of land involved for forestry purposes."

By decision of March 17, 1905, your office directed the local officers to reject Mrs. Bradley's proof, citing in support of its action the cases of M. Edith Curtis (33 L. D., 265) and Joseph W. White (Id., 285).

On appeal by Mrs. Bradley the action of your office was affirmed by unreported departmental decision of July 25, 1905.

The case is again before the Department on motion for review filed by the applicant.

It is asserted in the motion that Mrs. Bradley's application to re-advertise was filed on December 22, 1903, within ten days from the date originally set for the submission of proof, and it is contended that this served to keep her claim alive and to prevent the attachment to the land of the order of withdrawal of July 31, 1903. As to this contention it may be said (1) that the file mark on the back of the application to readvertise shows that the same was filed in the local office December 30, 1903, or sixteen, instead of ten days after the date originally set for the submission of proof; and (2) that as to lands covered by timber and stone filings embraced within the order of withdrawal of July 31, 1903, and other orders similarly worded, it is wholly immaterial whether the application to readvertise is filed before or after the expiration of the final proof period, for in neither event could proof be lawfully submitted under readvertised notice, for the reason that immediately after the expiration of the final proof period, the applicant being then in default in the matter of proof, the order of withdrawal attaches, and the land thereupon becomes no longer subject to purchase under the timber and stone act. See case of M. Edith Curtis, *supra*.

Furthermore, the local officers were instructed by your office, in its decision of August 24, 1904, to permit Mrs. Bradley to complete the purchase of the land only in the event of there being no adverse claim to the land. In the case of Joshua L. Smith (31 L. D., 57) it is held that an executive order reserving lands for a specific public purpose has the same effect that an adverse claim of a private individual would have. In view of this ruling it is held that the withdrawal of July 31, 1903, was an adverse claim, and that, therefore the local officers acted without authority when they issued the notice upon which the proof was submitted.

As to the assertion made in the motion to the effect that at the date of the submission of proof the withdrawal had been revoked, it is only necessary to say that the only basis therefor is the fact that a portion of the land withdrawn by said order has been restored to entry, but, upon informal inquiry at your office, it is learned that no portion of the land herein involved has been so restored.

The motion under consideration presents no sufficient reason for disturbing the decision complained of, and none appearing otherwise, the said decision is adhered to, and the motion for review is hereby denied.

COAL LANDS—CHARACTER OF LAND—EVIDENCE.

INSTRUCTIONS.

In determining whether a tract of public land contains coal deposits the well known rules of evidence are as applicable as in any other case, and whatever is relevant to and bears in any degree upon the question is admissible in evidence.

In such cases the characteristics peculiar to coal deposits are to be kept in view, and the presence of such deposits may be determined upon authenticated evidence of conditions which constitute the sufficient guide of the geologist or coal expert.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 26, 1905. (F. H. B.)

Under date of September 5, 1905, the Director of the Geological Survey transmitted to the Department, for its consideration, copy of a letter addressed to him from Salt Lake City by Mr. Joseph A. Taff, a geologist of that bureau, which is as follows:

I have been in Utah now three weeks, engaged in the investigation of coal lands in cooperation with Mr. G. E. Hair, Special Agent of the General Land Office, and I find the following conditions, which, without reasonable question, are subject to and demand investigation and action by the Department of the Interior:

The citizens have applied to purchase the lands subject to investigation, either as grazing or coal lands, and the sales are withheld until it is determined whether or not they contain commercially valuable coal. If these lands do not contain coal, they are the property of the State of Utah, and are subject to sale at not exceeding \$2.50 per acre. If they contain coal, they belong to the United States, and are valued at \$15 or \$20 per acre, depending upon whether they are more or less than fifteen miles from operated railroads.

With these preliminary statements in regard to relations of State and Government lands, I beg to inform you that there is a ruling in force in the State, promulgated by a Commissioner of the General Land Office, that lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres proposed for sale. To this ruling the local United States Land Office and State Land Board have been and are now subject.

Under the existing conditions of the coal deposits as I find them, such a ruling prevents the proper classification of coal lands, prevents the sale of such lands desired by honest would-be purchasers in tracts of sufficient size to warrant profitable exploitation, has caused large areas of very valuable coal lands to be classed as grazing land and sold at \$1.50 per acre, and will cause the continued sale of such lands if it remains in force.

Since a land sub-division may lie in any attitude with respect to a continuous coal outcrop, a forty-acre tract or a section of land may be within a few hundred feet of exposed coal and so situated that coal could be mined from the entire tract, and yet it would be impossible to find coal in the area before purchase.

I respectfully suggest that the attention of the Secretary of the Interior be brought to this matter, and most earnestly request that he cause a ruling to be

issued permitting the classification of lands as coal lands in legal subdivisions as established by the United States surveys to distances of one mile beneath the surface from the known outcrops of commercially valuable beds of coal.

This correspondence was, upon receipt, referred to your office "for early report in duplicate, and return of papers, with recommendation," all of which are now before the Department.

In the report thus submitted your office discusses at some length certain decisions of the United States Supreme Court and of the Department as supporting a rule of classification which rejects evidence of extrinsic conditions, standing alone, and concludes that no such showing is made by Mr. Taff—

as would warrant the Department in modifying the practice to the extent of holding, as he appears to desire, that lands may be adjudicated to be mineral lands solely upon the geological formation thereof and of the geological formation and of the discoveries and development of mineral on adjoining lands.

In entering upon consideration here of the report and request of the geologist it may be remarked that the question raised has of late been suggested to the Department under circumstances which emphasize its importance. It is believed, however, that the obstacles opposed to its satisfactory solution, in justice to the government and others, are more apparent than real, and are for the most part the unsubstantial result of confusion of the admissibility and the weight of evidence. It will be profitable at this point to examine, in order to make it clear that they do not warrant the construction that evidence exclusively of the mineral character of lands surrounding or adjoining a particular tract in controversy is *incompetent* to establish the like character of the latter, the following decisions of the Supreme Court, two of which are cited by your office and given that effect, in which the question of the character of certain tracts, alleged to contain known lodes or coal deposits, respectively, was determined adversely to the alleged mineral character.

In the case of *Colorado Coal and Iron Co. v. United States* (123 U. S., 307, 327-8) the court, after referring to certain earlier cases in which the mineral character of the lands therein involved had been established by direct and positive evidence, said:

It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be "known mines" unless at the time the rights of the purchaser accrued, there was upon the ground an actual and opened mine which had been worked or was capable of being worked.

* * * * *

The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine.

In *United States v. Iron Silver Mining Co.* (128 U. S., 673, 683) the evidence as to the existence of lodes or veins in territory

for which, it was alleged, placer patent had been fraudulently obtained, was held to be insufficient, the court saying:

It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.

Sullivan v. Iron Silver Mining Co. (143 U. S., 431) presented the question of a known lode, within the meaning of section 2333, Revised Statutes, within patented placer limits, and concerning the evidence submitted to establish the existence of such a lode, the court said (p. 435):

Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained, no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section.

Dower v. Richards (151 U. S., 658) involved the question of a vein or lode upon which active and profitable mining operations had for many years been conducted, but which had thereafter been abandoned and yet subsequently made the subject of a lode location, alleged to have been such a known lode as to except it from a town-site patent earned and issued during the period of abandonment. Affirming the decision below, to the effect that a lode regarded as worked out and therefore abandoned was not a "known lode," the court added (p. 663):

It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered

to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback v. Hawke*, 115 U. S. 392; *Davis v. Webb*, 139 U. S. 507.

The first of these was a suit in equity by the United States to vacate sixty-one patents issued for as many distinct tracts of land, under the pre-emption act of 1841, and alleged to have been fraudulently obtained. One ground relied upon to maintain the suit was that, as disclosed by evidence in the record, the patented lands embraced "known mines" of coal and were therefore excepted from disposition under the pre-emption law. As appears from the above-quoted portion of the opinion, the specific objection of the court went to the weight of the evidence found in the record, which apparently established mere "surface indications of the existence of veins of coal" at the time of sale. In the first paragraph of the quotation the court merely stated the situation in prior decided cases, and made no attempt to outline a rule of determination.

The second case cited was also a suit in equity, begun by the United States to vacate two placer patents. It was alleged, and attempted to be proved, that the patented land was not placer in character but contained sundry veins or lodes, within the knowledge of the patentee at the time of his application for the patent. Apparently, this inference was attempted to be drawn principally from the fact, established by the evidence adduced, that the patentee had originally made lode locations upon the ground, which he afterwards abandoned and substituted with placer locations. The court found no evidence of lode discoveries of any character, but remarked abstractly that "some indications by outcroppings" are not enough to establish the "known" existence of lodes.

The case of *Sullivan v. Iron Silver Mining Company* was an action of ejectment brought by a placer patentee to recover possession of a certain portion of the premises embraced within the patented placer limits, upon which the defendants had entered after the issuance of the placer patent. The defendants set up, in defense to the action, a lode location by them of the ground in controversy, and alleged discovery of a valuable lode therein and its known existence at the date of the placer location. Upon the question of the discovery and known existence of a lode as alleged issue was joined. The effort thus made to establish an exception out of the placer patent failed for want of sufficient evidence to sustain the defendants' allegations, the nature of the evidence submitted by them being discussed in the portion of the opinion above quoted and the showing condemned as "merely a matter of speculation and belief."

The last case cited was also an action of ejectment, brought by a claimant under a townsite patent to recover possession of two

city lots within the patented townsite limits. The defendants, in their answer, asserted title to the ground by virtue of a mining location upon a lode alleged to have been known to exist and to have been worked long prior and subsequent to the patent and therefore to have been excepted therefrom. The facts established were that for many years prior to the issuance of the townsite patent the lode in question had been profitably worked, and many tons of gold ore extracted from it, but that some months prior to patent work on the ledge was abandoned and nothing further attempted until many years thereafter, when the defendants' location was made, the ledge having in the interval been regarded as worked out and as of no further value for mining purposes. Under these facts it was held that "known" existence of the alleged lode, so as to except it from conveyance by the townsite patent, was not established.

In none of these cases, therefore, nor in any decision of the court of which the Department has knowledge, is it held that evidence of exploitation and development of the particular tract in controversy must always be adduced to establish its mineral character. In but one of the cited cases, the third, was anything like evidence of conditions outside or surrounding the tract in controversy submitted, and that was considered and found to fall short of establishing its mineral character. In the last two cases the evidence touching the character of the lands in question amounted to expressions of opinion and belief, in the one, and to an unwarrantable inference in the other. In the first two cases thus considered, upon evidence, though meagre, of conditions upon the tracts themselves, patents of the government were directly assailed, against which a mere preponderance of evidence, sufficient to turn the scale in ordinary actions, would in no event have been allowed to prevail. As said by the Court in *Maxwell Land-Grant Case* (121 U. S., 325, 381) :

We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.

Indeed, that from extrinsic conditions the existence of a vein within the boundaries of a given tract might be ascertained is con-

ceded in *Iron Silver Mining Co. v. Reynolds* (124 U. S., 374, 384) thus:

There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.

Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the claim from another lode, or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As well observed by the court, when the case was here before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute, should be settled as they arise.

The decisions of the Department, it is true, with respect to the establishment of the coal or other mineral character of lands, have in a number of instances tended to support the conclusion that actual developments upon a tract in controversy are indispensable. One of the early cases considered was *Dughi v. Harkins* (2 L. D., 721), in which a homestead entry was assailed by the mineral claimants of the tract involved, the Department saying on that occasion:

This land was returned by the surveyor-general as agricultural in character, and hence was subject to a homestead entry. In such case the agricultural character of the land continues until its mineral character is satisfactorily shown; and, upon a hearing ordered to establish its true character, the homestead entryman may rest upon the surveyor-general's return, and is required only to rebut proof of its mineral character. The burden of proof is therefore on the mineral claimant and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the character of this class of lands.

In the later case of *Commissioners of King's County v. Alexander et al.* (5 L. D., 126), which arose upon protests against certain coal entries, it was said:

Aside from the testimony offered by the protestants, the evidence submitted by the counsel for the entrymen shows that their opinion is based upon a mere theory that coal will be found, if the shaft is sunk deep enough. But it has been repeatedly held by this Department that the proof of the mineral character of land must be specific and based upon the actual production of mineral; that it is not enough to show that the neighboring or adjoining lands are mineral in

character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it. *Hooper v. Ferguson* (2 L. D., 712); *Dughi v. Harkins* (*Ibid.*, 721); *Roberts v. Jepson* (4 L. D., 60); *Cleghorn v. Bird* (*Ibid.*, 478); *Lientz et al v. Victor et al.* (17 Cal., 272); *Alford v. Barnum et al.* (45 Cal., 482).

The use in those decisions, and others in which it is repeated, of the expression "actual production," doubtless, has given rise to a rigid rule in the determination of the character of lands not contemplated by the Department. Taken literally, a requirement of an "actual production" from a tract in controversy as a condition to the establishment of its mineral character would exclude from consideration mere exposures of mineral deposits; and this certainly was not intended. Indeed, whilst the decisions have evidently thus far been adverse where evidence of surrounding conditions has not had the support of discoveries or disclosures on the tracts directly involved, it is nevertheless true that such evidence has been given consideration and has never been held inadmissible. Thus, in *Savage et al. v. Boynton* (12 L. D., 612, 614); whilst citing *Dughi v. Harkins* and *Commissioners v. Alexander*, *supra*, it was said:

In the case at bar coal has been discovered in the vicinity of the land, and at one place about twenty-five or thirty tons have been taken out from time to time by the people living near by for their own use, but there is no evidence showing that coal is being or has been mined anywhere in that immediate section for merchantable purposes. Furthermore the contestants seek to establish that by reason of the coal measures found on adjacent tracts and by the dip and angle of inclination of said measures, that coal exists on the land in question at the depth of from seven hundred to eight hundred feet, but I do not think a preponderance of the testimony sustains this claim.

In *Scott v. Sheldon* (15 L. D., 361, 362) the following comments were made:

There is not even expert evidence offered to show that it is probable that the veins of coal in that vicinity extend into or underlie the land sought to be entered as a homestead. But one witness for the defense testifies to this probability, but his testimony is not sufficient to convince me, especially in the face of the fact that no attempt seems ever to have been made to demonstrate the truth of this theory.

The coal-land laws, embodied in sections 2347 to 2352, inclusive, of the Revised Statutes, do not prescribe "discovery" upon the land sought as a condition precedent to the acquisition of title, excepting only as they confine the "preference right of entry" to one who has "opened and improved" a mine on the tract. In this they differ from the lode and placer mining laws, whereunder "discovery" within its limits is specifically an indispensable pre-requisite to the validity of a location, together constituting the initiation of rights under those laws. Whilst this technical "discovery" does not of

itself establish the patentably mineral character of the land, which may be determined in the absence of a location, it is naturally a link in the chain of evidence; and analogy may have suggested the association of the same elements in respect to coal lands. But there is no location under the coal-land laws, and the analogy is imperfect. The well known rules of evidence are as applicable here as in any other case, and whatever is relevant to and bears in any degree upon the question of the character of a given tract of land is admissible in evidence to the end of its ascertainment.

The particular subject of the present consideration is coal deposits, and the concern is of the data which may be relied upon to determine their presence in any case. The characteristics peculiar to them, therefore, must be taken into account and kept steadily in view. These bedded deposits, generally of wide extent and of regular formation, the result of slow accumulation at the earth's surface, following laws of occurrence common to stratified formations and consequently conforming to the lay of adjacent strata, differ radically from most other useful mineral deposits, particularly the metalliferous ores, which rarely occur in sedimentary beds, but generally in veins and pockets, and replacement, impregnation, and contact deposits, and which, from the nature of their origin, present such abrupt variations in form and character as to preclude safe prediction of their underground extension or calculation of their quantity or quality in advance of exploitation. Even where the coal beds were deposited upon an uneven floor, and vary rapidly from place to place, the geologist can easily ascertain the extent of variability and from the conditions of deposit the degree of persistency of the coal beds; and, readily determining in most fields the geologic structure, can further determine the area of workable coal and closely approximate the depth at which an outcropping coal bed will be found in any part of the field. It is well recognized that constancy or variability at the outcrops or other exposures are evidences of the same conditions underground. In this connection the following extracts from what is endorsed as a standard work, by J. P. Lesley, entitled "Manual of Coal and its Topography," are of interest:

Coal is never found issuing in veins from the interior of the planet, like gold and silver; nor filling irregular cross crevices in limestone, like lead; nor spread abroad in lakes of hardened lava, like basalt and greenstone; nor embedded in clay, crystallizing upward from the walls and bottoms of deep wide fissures, as bunches of grapes, or in bundles of pipes, like the hematite ores; nor lying exposed upon the surface in blocks, like native copper, or meteoric iron; but always as a thin sheet or stratum, extending through the hills as far as the hills extend, and inclosed between similar sheets of other kinds of rock.

* * * * *

Nothing is more surprising than the vast expanse of even the thinnest of these sheets of coal. The original deposit of carbonaceous matter seems to

have been in every instance almost co-extensive with the lake or sea in which it was laid down.

* * * * *

Each sheet of coal extends for itself and by itself as far as the mountain does in which it lies, never branching nor forking nor rolled together, but passing through the mountain from side to side, from end to end, or cleaving down through it from summit to base, from end to end, and commonly in this latter case passing under an adjoining valley and reascending through the length and breadth of a mountain on the other side.

* * * * *

The practical character of a coal bed is soon determined by a few good openings upon its outcrop.

* * * * *

Under ordinary circumstances and for all practical purposes the quality, size, and mining condition of a coal bed can be explored as well in two or three days by a gangway ten or fifteen feet long, as by workings through it for a month or a year.

* * * * *

The only proper method is to open the same bed at numerous places along its outcrop, and from a comparison of these crop openings the actual average character of the bed within can be confidently predicted, and its contents calculated.

* * * * *

A coal bed may indeed belie itself at one point or at two where openings are made, but not at a dozen. Veins of lead, of copper, of iron alternately increase and diminish in size, rapidly and unexpectedly. The miner never knows until he strikes the vein what it will be worth, nor how soon the pocket which he has entered may close up between bare walls. Not so with coal. It varies little and seldom disappoints. What it is at one point it is likely to be much the same at another.

* * * * *

Even intervals of hundreds of miles in which it has undergone an infinite number of slight and perhaps some striking variations, will sometimes present it at the most distant places with strangely identical features, showing how vast and regular has been the law of its deposit.

* * * * *

The great Pittsburg bed is a remarkable instance of this law, covering as it does tens of thousands of square miles, and scarcely varying from a thickness of eight feet, showing itself always a double bed, and yielding everywhere both a superior quality and quantity of coal.

Upon faith of such investigations prudent men often expend large sums of money in the purchase of lands and development of the property. Often the depth or thickness of the overlying strata is such as to prohibit economical exploration from above, and the distance of many tracts from outcrops, or openings made at convenient and accessible points, is too great to justify penetration by drifts or slopes for purposes of preliminary investigation and ascertainment alone. In the nature of things, therefore, reliance must frequently be had upon such evidences as may become the guide of the geologist or coal expert.

Mere outcrops, disintegrated by action of the elements and broken

and mixed with debris as they often are, seldom bear witness in themselves of the quality and quantity of the coal beds behind them. Unless in such cases, therefore, they are sufficiently exploited no determination of the coal character of the overlying lands can be reached by the land department. Nor can opinions, unexplained or expressed by unqualified witnesses, suffice upon any point. The character of the outcrops, or the extent and result of their exploitation, or the nature, extent, and result of exposures of the coal bed otherwise made, the positions of the outcrops or openings with relation to each other and to the tract in controversy, the thickness, merchantable quality, and identifying characteristics of the coal bed, the geological formation and other data whereby the position and areal extent of the coal bed with respect to the tract in controversy are determined, should be fully set out in the evidence, the qualifications of the witnesses shown, and the situation illustrated, as far as possible, by plats, charts, photographs, and other exhibits, properly authenticated and introduced in evidence, for the guidance of the land department. Each such case must then be adjudicated upon its individual merits, the question of depth of each ascertained deposit, as affecting its commercial value, to be considered in that connection, if important.

CONTEST—MOTION TO DISMISS—REHEARING.

NEILSON *v.* BLUM.

Where a contestant fails at the hearing to sustain the allegations in the affidavit of contest relative to the nonmilitary service of the homestead entryman charged with abandonment, and the defendant thereupon moves that the contest be for that reason dismissed, a new trial should not be granted for the purpose of permitting the contestant to supply the proof he neglected to produce at the hearing, but the contest should be dismissed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 27, 1905. (E. P.)

May 21, 1900, Algot Blum made homestead entry of the NW. $\frac{1}{4}$ of Sec. 9, T. 155 N., R. 85 W., Minot land district, North Dakota, against which entry William J. Neilson, on November 18, 1901, filed an affidavit of contest, charging abandonment and failure on the part of the entryman to establish a residence on the land, which default, it was alleged, was not due to service in the army or navy.

Notice issued citing the parties to appear before the local officers February 15, 1902, and submit testimony. On the day appointed both parties appeared, and after certain motions made on behalf of the defendant had been overruled by the local officers, the plaintiff

submitted his testimony, which, while showing that the defendant had never established a residence on the land, failed to show that his absence from the land was not due to military service. When the plaintiff had rested his case the defendant moved that the contest be dismissed because of the failure of the plaintiff to sustain his allegations as to non-military service. This motion was promptly overruled by the local officers, to which ruling the defendant noted an exception. From the testimony submitted the local officers found that the defendant had never established a residence on the land and recommended that the entry be canceled. From the action of the local officers the defendant appealed.

In passing upon the defendant's appeal your office, in its decision of January 28, 1904, after finding that the defendant had never established a residence on the land, and that the plaintiff had failed to prove that the defendant's absence from the land was not due to military service, said:

The defendant's motion to dismiss the contest for the reason that the contestant had not shown that the defendant's absence from the land was not due to his employment in the army or navy should have been dismissed conditionally; that is, the contestant should have been given the opportunity to have produced testimony on this point, and in case of failure to make the proof required by the statute, his contest should have been dismissed.

The government is a party in interest in all contests, and in view of the unsatisfactory condition of the record and the facts disclosed, I do not think this case should be dismissed, but that it should be remanded for further hearing, and the contestant afforded an opportunity to submit testimony touching the matter indicated and the defendant an opportunity to put in his defense on the merits.

Upon motion of the plaintiff, filed in the local office March 26, 1904, the local officers, on March 29, 1904, issued new notice, citing the parties to appear before them May 20, 1904, and "furnish evidence touching the allegations of the contest affidavit filed in this case."

On the date set for the hearing last ordered both parties appeared, by their respective attorneys, before the local officers. The defendant formally objected to the jurisdiction of the local officers to take any further testimony with reference to said charges except in a new proceeding regularly initiated, the basis of said objection being that your office had no authority to remand the case for further hearing for the purpose of affording the plaintiff another opportunity to sustain his allegations, in the face of the defendant's motion to dismiss the contest because of the insufficiency of the showing made by the plaintiff at the former hearing.

No oral testimony was submitted at this hearing. It appears, however, that there was then on file in the local office two depositions, taken May 16, 1904, under the authority of a commission issued by

the local officers upon the application of the plaintiff. These depositions, consisting of responses made to certain written interrogations, prepared by the plaintiff's attorney, tend to show that during the years 1900, 1901, 1902 and 1903, the defendant was residing with his family at Arvilla, North Dakota (a place shown by the map to be about two hundred miles from the land), and that his absence from the land was not due to military service. It does not appear from the record, however, that these depositions were offered in evidence, that they were with the record in the case at the time the second hearing was had, or that either the defendant or his attorney had any knowledge that they were then on file in the local office.

Testimony was submitted at this hearing on behalf of the defendant which tends to show that in the summer of 1902, the defendant built upon the land a one-story frame house, fourteen by sixteen feet, and remained on the land at the time the house was built about a week; that in February, 1904, he, with his family, removed to the land and thereafter continuously resided there until the date of the hearing; and that the improvements on the land, consisting of the house and from ten to fifteen acres of breaking, were worth from a hundred and fifty to two hundred dollars.

Upon the conclusion of the testimony the defendant moved that the contest be dismissed upon the grounds (1) that it was not proved that his absence from the land was not due to military service, and (2) that the undisputed testimony showed that prior to issuance of the notice of the last hearing he had cured any laches that might have theretofore existed.

August 4, 1904, the local officers held as follows:

That the defendant, Algot Blum, had never established or maintained any residence whatever on the land in question prior to the service of the first notice of contest on him, or prior to the time that this office acquired jurisdiction in this case.

At the conclusion of the taking of testimony the defendant moved that this contest be dismissed for the reason that the defendant had cured any laches that might have existed prior to the service of notice of the hearing of this contest. We do not think that the above motion is well taken, for the reason that this contest was remanded to the Commissioner for the purpose of enabling the plaintiff to introduce testimony as to whether the defendant was employed in the service of the U. S. Army or Navy, and the defendant an opportunity to put in his defense on the merits. Said motion is hereby denied.

They therefore recommended that the entry be canceled.

On appeal by the defendant, your office, by decision of March 3, 1905, held as follows:

The evidence in the case shows that at the time the contest was filed the defendant had never established his residence on the land, but it appears that in January, 1904, and before this contest was remanded, the defendant had moved his family on the land and had broken eight or ten acres.

It is contended by the defendant that contestant's failure to prove non-military service at the first hearing in the presence of defendant's objection and his motion to dismiss on the ground of such failure entitled him to a dismissal of the contest; that when the contest was remanded on January 28, 1904, by this office on the status then existing as shown by the record, the defendant was entitled to a dismissal of the contest; and, further, it appearing that the defendant had cured his laches in January, 1904, before the case was remanded and before any step was taken towards supplying the defect in the contestant's proof as to non-military service, this contest should be dismissed; that remanding the case on January 28, 1904, was in substance equivalent to dismissing the contest and giving the contestant a preference right to proceed *de novo* with his contest.

This contention of the defendant is not supported by the practice of the Department.

It appearing that the defendant had not established his residence on the land at the time the contest was filed, and it further appearing from said depositions referred to that the default of the entryman was not due to military service, the said entry is held for cancellation.

From said last-mentioned decision of your office the defendant has appealed to the Department, alleging error as follows:

1. The Hon. Commissioner erred in failing to pass upon the questions raised by the motion to dismiss for the reason that there was no proof of the non-military service of the defendant as alleged in the contest affidavit and notice.
2. The Hon. Commissioner erred in considering the depositions filed in said cause as alleged in the opinion, said depositions having never been offered in evidence and not being in evidence in said cause.
3. The Hon. Commissioner erred in holding said entry for cancellation.
4. The Hon. Commissioner erred in overruling the motion to dismiss made at the close of testimony in said cause.
5. The Hon. Commissioner erred in holding that there was no curing of the laches of the defendant prior to the service of contest notice.

At the first hearing had in this case the plaintiff wholly failed to comply with what the Department has repeatedly held to be an absolute requirement imposed by the act of June 16, 1898 (30 Stat., 473), namely, that in all contests thereafter initiated against a homestead entry on the ground of abandonment the contestant must prove at the hearing that the settler's alleged absence from the land was not due to military service. On the ground of such failure on the part of the plaintiff, the defendant, at the earliest possible moment, moved that the contest be dismissed, which motion was overruled by the local office, and this action of the local officers was made one of the grounds of the defendant's appeal. Your office, however, while finding the ground upon which this motion was based was clearly sufficient, held, in effect, that the plaintiff was entitled to another opportunity to sustain his allegations, and for this purpose directed that a rehearing be ordered. The Department believes that this was error. The fact that a party neglects to so present his case as to meet the requirements of the law is not a sufficient reason for the

granting of a new trial. Every person is presumed to know the law, and where, as in a case like the one at bar, ample opportunity has once been afforded a contestant to properly present his case, and he fails to do so, he should abide by the consequences of his neglect. To hold otherwise would be to encourage a laxity in the presentation of cases that would have a tendency to lead to never-ending controversies and create doubt and uncertainty as to the effect of proceedings before the land department. The Department is of opinion that upon the defendant's motion made at the first hearing, he was clearly entitled to a judgment of dismissal.

Under this view, the contestant's motion for the issuance of new notice can be considered in no better light than that of the initiation of a new contest, and as it appears from the undisputed testimony submitted on behalf of the defendant at the second hearing that at the date of the initiation of the second contest, if it can be called such, the defendant was with his family residing on the land, it must be held that he had, so far at least as the contestant was concerned, cured any laches that might theretofore have existed.

For the reasons above stated the contest is dismissed.

The action of your office is accordingly hereby reversed.

RAILROAD GRANT-INDEMNITY SELECTION-ACT OF JULY 1, 1898.

CASEY ET AL. v. GRIGNON ET AL.

All action looking to the disposition of lands involved in second indemnity selections made by the Northern Pacific Railway Company in lieu of lands alleged to have been lost to its grant within the limits of the withdrawal on general route of the Lake Superior and Mississippi Railroad Company, has been suspended by the land department to await final determination of the question (now pending before the Supreme Court of the United States) whether lands so situated furnish a sufficient basis for second indemnity selection; but where it appears that any such lands are embraced in entries allowed prior to selection by the company, the suspension as to such lands will no longer continue. Action on such entries will proceed in due course and the selection to that extent will be canceled. In case of a decision favorable to the company on the question pending before the court, it may then relinquish whatever claim it may have to the lands under its selection, with a view to selection of other lands in lieu thereof under the provisions of the act of July 1, 1898.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 27, 1905.* (F. W. C.)

The Department has considered the appeal by Sarah L. Casey from your office decision of May 13, 1905, rejecting her homestead application, proffered July 16, 1896, as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of

Sec. 11, T. 54 N., R. 11 W., Duluth land district, Minnesota, for conflict with the allotment of Oscar F. Waggoner, and suspending action upon her application as to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 11.

As originally presented her application covered the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 11. The application as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11 was rejected for conflict with the allotment of Henry Grignon and said rejection was sustained by your office decision "G" of November 3, 1897, and the case closed.

Your office decision appealed from disposed of other applications for lands in said section 11, but Casey seems to be the only one who appealed.

The entire tract covered by Casey's application was included in a list of indemnity selections filed by the Northern Pacific Railroad (now Railway) Company, October 17, 1883, the selection being known as second indemnity list No. 15, re-arranged list No. 15 B. Grignon and Waggoner are Winnebago Indian allottees, their allotments having been made July 8, 1873, under the ninth and tenth sections of the act of July 15, 1870 (16 Stat., 361), and the act of May 29, 1872 (17 Stat., 185). Said allotments were approved by the Department July 23, 1873, and Grignon having subsequently become a citizen of the United States, the Department, September 23, 1896, upon the recommendation of the Commissioner of Indian Affairs, directed that a patent in fee be issued to Grignon for the land covered by his allotment. No further action appears to have been taken upon these allotments because of undisposed of railroad indemnity selection filed October 17, 1883, more than ten years after the allotments to Grignon and Waggoner.

The railroad indemnity selection in question is based upon a loss within the limits of the withdrawal on general route of the Lake Superior and Mississippi Railroad Company, which the Department has held not to furnish a sufficient base for a second indemnity selection. The question involved is pending in a case recently decided by the Circuit Court of Appeals for the Eighth Circuit, from which an appeal has been taken to the Supreme Court of the United States. The Department has for several years suspended action upon lands involved in selections of the character here in question, pending the final determination of the case brought by the railway company, in order to have the question involved judicially determined, and it is believed to be in the best interests of all to continue such suspension until the case is determined by the Supreme Court of the United States. In cases, however, where, like the allotments here in question, the entries were allowed prior to the railroad indemnity selection, there would seem to be no good reason for continuing the suspension as to such lands, for no matter what the decision may be it would not affect the interests of these claimants, and it would not,

in the opinion of this Department, be to the best interests of the Indians to permit a transfer of their claims to these allotted lands to others under the provisions of the act of July 1, 1898 (30 Stat., 597, 620). As a consequence, the only result of a decision favorable to the company, in the Supreme Court, would be to afford the railway company the privilege of relinquishing whatever claim it might assert under its selection of these lands, to the end that it might select others under the act of July 1, 1898, *supra*.

It is therefore directed that the suspension no longer continue but that these allotments be proceeded with in due course, and for that purpose the selection as to the lands involved will be finally canceled. Your office rightly held the claims of these Indian allottees to be superior to the right of Casey under a homestead application proffered, as before stated, July 16, 1896. This reduces her application to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 11, which is in conflict with the railroad indemnity selection of October 17, 1883, and the suspension will continue as to said tract until the question of the company's rights under its selection is finally determined by the decision of the Supreme Court.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—ADJUSTMENT—PURCHASER—ACT OF JULY 1, 1898.

NEIL *v.* NORTHERN PACIFIC RY. CO.

Where at the time of the passage of the act of July 1, 1898, the conflicting claims of a homestead settler and the Northern Pacific Railway Company to a tract of land were of a character subject to adjustment under that act, the fact that the settler subsequently purchased the land from the company in order to protect his improvements will not prevent him from transferring his claim to other lands in accordance with the provisions of said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) October 28, 1905. (E. J. H.)

The W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 1, T. 3 N., R. 1 E., Vancouver, Washington, land district, is situated within the primary limits of the grant made to the Northern Pacific Railroad (now Railway) Company, by the joint resolution of May 31, 1870 (16 Stat., 378), and was patented to said company May 21, 1895.

May 2, 1896, James S. Neil tendered his homestead application for the above described land, which was rejected by the local officers because the land had been patented to the company, and he appealed.

April 7, 1905, Neil filed his election to relinquish said land and transfer his claim to other land in lieu thereof, under the provisions

of the act of July 1, 1898 (30 Stat., 597, 620). In Neil's sworn statement of election it is shown that in 1889 he purchased the improvements then on the land of a prior settler and established residence thereon; that in 1890 and 1891 he made further improvements and with his family resided on the land until September, 1898, at which time he had a house fifteen by twenty feet, a barn eighteen by twenty-four feet, a wood-shed, two acres cleared, thirty acres slashed, one-half mile of fencing and an orchard, and had raised crops every year, the value of his improvements being \$600; and that in September, 1898, he purchased said land from the Northern Pacific Railway Company and had since sold the same.

May 10, 1905, your office decision held that in September, 1898, Neil, instead of seeking relief under the act of July 1, 1898, abandoned his homestead claim and purchased the land from the company and subsequently sold the same, "thus divesting himself of all right, title and interest in and to it, and that he has now no homestead claim thereto for adjudication under the said act of 1898." The decision of the local officers rejecting his homestead application was affirmed, and his election to relinquish the land under said act was held for rejection, from which action Neil has appealed to the Department.

In the case of *Newkirk v. Northern Pacific Railway Company* (32 L. D., 369), it was held that—

The act of July 1, 1898, refers to conditions existing at the time of its passage, and if the conditions were such at that time as to permit the adjustment of the conflicting claims of the Northern Pacific Railway Company and an individual claimant, to a tract selected by the company within the indemnity limits of its grant, the fact that the land department failed to proceed under the act until after the individual claimant had relinquished his claim in order that his son might make entry thereof, will not prevent such adjustment being made, and the action of the individual whose claim was pending at the date of the passage of the act, in so relinquishing his entry, will be considered as equivalent to an election on his part to retain the land for the purpose of adjustment.

At the time of the passage of the act of 1898, Neil's homestead application for the land in controversy between him and the railroad company was pending in your office on appeal from its rejection by the local officers, and the conditions were such that said conflicting claims were then adjustable under said act. *Humbird et al. v. Avery et al.* (195 U. S., 480, 506). It appears that *Newkirk*, in the case above cited, subsequently to the passage of the act of 1898, relinquished his claim to the land in order that his son might make entry thereof, while in this case Neil, in order to save his valuable improvements, purchased the land of the company. This purchase should not be considered as an abandonment of his claim but rather that it supports his election to transfer his settlement claim

to other land, the purchase from the railroad company having evidently been made to protect his improvements until an advantageous sale thereof could be made.

Your office decision rejecting Neil's election to relinquish his claim to the land under the act of 1898, is reversed, and the case remanded for your further consideration and action in the light of the ruling herein made.

MINERAL LANDS—CLASSIFICATION—ACT OF AUGUST 5, 1892.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The fact that a tract of land was, prior to survey, classified as mineral under the act of February 26, 1895, can not be considered as a classification of the land as mineral "at the time of actual government survey," within the meaning of the act of August 5, 1892.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 31, 1905.* (F. W. C.)

The Department has considered the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of May 19, 1904, holding for cancellation the selection made August 25, 1893, by said company for lots 2 and 4, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$; Sec. 3, T. 25 N., R. 22 W., Kalispell land district, Montana.

The selection in question was made under the act of August 5, 1892 (27 Stat., 390), by which act the said company, in lieu of its relinquishment of certain lands to which it was entitled and which had been disposed of by the United States without regard to the claim of said company, was granted the right to select—

an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made

The land in question was returned in the report made by the mineral land commissioners appointed under the act of February 26, 1895 (28 Stat., 683), for the month of June, 1896, as mineral land, it being a portion of a body of land returned by said commissioners as mineral land in their report for said month, and the classification as made was approved by the Secretary of the Interior on December 14, 1896.

The act of February 26, 1895, under which this classification was made, was designed to separate the mineral lands from the nonmineral lands for the purpose of aiding a speedy adjustment of the Northern Pacific land-grant. While it is true that the classification made by said commissioners when approved was final as to the Northern Pacific Railroad Company, it did not prevent such disposal of

the lands as may be proper on a subsequent showing as to their character, the effect of the return by the mineral land commissioners being likened to the return of mineral lands made by the government surveyor (25 L. D., 446). A return of the lands as mineral prior to the public survey can not, however, be considered as a classification of the lands as mineral at the time of the actual government survey, within the meaning of the act of August 5, 1892.

The lands here in question were surveyed in 1897, subsequently to the approval of the mineral classification before referred to, and the survey as made was approved by the surveyor general June 23, 1898. An examination of the field notes and plat of the government survey discloses no indication as to the presence of mineral upon any portion of the section in question, it being returned generally as fourth class soil, stony, mountainous, and well timbered. The return made at the time of the government survey is essentially a nonmineral classification, and, in the opinion of this Department, the previous classification by the mineral land commissioners under the act of February 26, 1895, can not defeat the selection in question.

Your office decision is therefore reversed, and, if the selection is otherwise regular and proper, it should be listed for approval with a view to the issue of patent.

RIGHTS OF WAY FOR CANALS, DITCHES, RESERVOIRS, TELEGRAPH AND TELEPHONE LINES, ELECTRICAL PLANTS, TRAMROADS, ETC.

REGULATIONS.

RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS.

Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals upon the filing and approval of the papers and maps therein provided for. When the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the Department having jurisdiction. But where the right of way is wholly within a military reservation, the application should be filed with the War Department, direct. A map and field notes of the portion within any reservation must be submitted, in addition to the duplicates required herein, except in the case of a forest or timber land reserve. This map and field notes must conform to all the

provisions of this circular, and the local officers will forward them to this office.

The word *adjacent*, as used in section 18 of the act, in connection with the right to take material for construction from the public lands, must be construed according to the conditions of each separate case (28 L. D., 439). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right-of-way act, and are applied to this, as the words are the same in both.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of this canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in a case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch shall not be com-

pleted within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The act approved May 11, 1898 (30 Stat., 404), entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," makes an important declaration in section 2 as to the purposes for which the rights of way under the act of 1891 may be used, but does not authorize the approval of any application for right of way for purposes other than irrigation. (28 L. D., 474; 32 L. D., 452 and 461.) The language of the act of 1898 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes or for the development of power, as subsidiary to the main purpose of irrigation."

1. These acts are evidently designed to encourage the much-needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting right of way over the public lands necessary to the maintenance and use of the same. The eighteenth section of the act of 1891 provides that—

The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

The control of the flow and use of the water is therefore, so far as this act is concerned, a matter exclusively under State or Territorial control the matter of administration within the jurisdiction of

this Department being limited to the approval of maps carrying the right of way over the public lands. In submitting maps for approval under this act, however, which in any wise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

2. The act is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the law, a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department. By section 21 of the act above quoted it will be seen that the approval of a map of a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, the approval of the Department granting only such right of way as the law provides. The width necessary for construction, maintenance, and care of a canal, ditch, or reservoir is not determined.

3. Whenever a right of way is located upon a forest or timberland reserve, the applicant must file a stipulation under seal, incorporating the following:

(1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.

(2) That the applicant will cut no timber from the reserve outside the right of way.

(3) That the applicant will remove no timber within the right of way except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards as determined by this Office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right

of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.

(4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business.

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this Office or the Department, and permission for such construction has been specifically given.

4. Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 16 and 17.)

5. Any incorporated company desiring to obtain the benefits of the law is required to file the following papers and maps with the register of the land district in which the canal, ditch, or reservoir is to be located, who will forward them to the General Land Office, where, after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval:

First. A copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory, under seal, that the same is the existing law. (See eleventh subdivision of this paragraph.)

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under the seal of the company, of the proper officer that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory, and that the copy of the articles filed in true and correct. (See Form 1, p. 236.)

Sixth. A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See Form 2, p. 237.)

Seventh. A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. In cases where the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. In cases where the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of it if the notice describes the location sufficiently to identify it with the canal or reservoir for which the right-of-way application is made. In cases where the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

Eighth. A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See eleventh subdivision of this paragraph.)

Ninth. A statement of the amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average monthly flow in cubic feet per second, and the average annual flow.

All available data as to the flow is required. The method of measurement or estimate by which these results have been obtained must be fully stated. In case there is no well-defined flow which can be measured, the area of the watershed, average annual rainfall, and estimated run-off at the point of diversion or damming should be given.

Tenth. Maps, field notes, and other papers, as hereinafter required.

Eleventh. If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of the second and eighth subdivisions of this paragraph, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded.

6. Individuals or associations of individuals making applications for right of way are required to file the information called for in the seventh, eighth, ninth, and tenth subdivisions of the preceding paragraph. Associations and individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association.

7. The maps filed must be drawn on tracing linen in duplicate, and must be strictly conformable to the field notes of the survey thereof. They must be filed in the land office for the district in which the right of way is located; but if located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps should show other canals, ditches, laterals, or reservoirs with which connections are made, but they must be distinguished from those for which right of way is desired by ink of a different color.

8. Field notes of the surveys must be filed in duplicate, separate from the map, and in such form that they may be folded for filing. Complete field notes should not be placed on the map, but only the station numbers where deflections or changes of numbering occur, station numbers with distances to corners where the lines of the public surveys are crossed, and the lines of reference of initial and terminal points, with their courses and distances. Typewritten field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should contain, in addition to the ordinary records of surveys, the data called for in this and in the following paragraphs. They should state which line of the canal was run—whether middle or a specified side line. The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments.

The field notes should show whether the lines were run on the true or the magnetic bearings, and in the latter case the declination of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal circle should be noted. The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

9. The scale of the map should be 2,000 feet to an inch in the case of canals or ditches and 1,000 feet to an inch in the case of reservoirs. The maps may, however, be drawn to a larger scale of 1,000 feet to an inch in the case of canals or ditches and 500 feet to an inch in the case of reservoirs when absolutely necessary to properly show the proposed works.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown, and the section, township, and range must be clearly marked on the map.

11. The termini of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of course and distance to the nearest existing corner outside the reservoir by a line which does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

12. When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than six miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes.

13. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark and course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3

and 4) must state the connections. These monuments are of great importance.

14. When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See paragraphs 11, 12, and 13.)

15. When a reservoir lies partly on unsurveyed land its initial point must be noted, as required for the termini of ditches in paragraph 11, and so that the reference line will not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4.

16. Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is located, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map, if in all respects regular when filed, will receive the Secretary's approval.

17. In filing such maps the initial and terminal points will be fixed as indicated in paragraphs 12 and 13.

18. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use. The map of the canal, ditch, or reservoir must show these distances, and the field notes must give the points of intersection and the distances. When corners are destroyed by the canal or reservoir, proceed as directed in paragraphs 21 and 22.

19. The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width, the limits of the variations from it must be clearly defined on the map. The field notes should record the changes in such a manner as to admit of exact location on the ground. In the case of a pipe line, the diameter of the pipe should be stated. The map must show the source of water supply.

20. In applications for right of way for a reservoir, the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered 1 foot in depth by the water it will hold;

1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

21. Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at, said corner. These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by this office, and must be at such distance from the works as to be safe from interference during the construction and operation of same. In case two or more consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

22. The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, setting on the random line a temporary mark at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it will be measured and the true course calculated. The proper correction of the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, being certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by this office. When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments, being governed by the special features of each case, must be left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

23. The engineer's affidavit and applicant's certificate must both designate by termini (as in paragraphs 11 to 17, inclusive) and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on a map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4)

the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation." (See Forms 3 and 4, page 237.) No changes or additions are allowable in the substance of these forms, except when the facts differ from those assumed therein.

24. When maps are filed, the register will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See paragraph 2.) If no unpatented land is involved in the application, the local officers will reject it, allowing the usual right of appeal.

25. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note the approval in ink, on the tract books, opposite each tract marked as required by paragraph 24.

26. When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the honorable Secretary. If the canal or reservoir has been constructed on the location originally approved, and is to be used until the canal or reservoir on the amended location is ready for use, the relinquish-

ment may be made to take effect upon the completion of the canal or reservoir on the amended location.

27. The act approved February 26, 1897 (29 Stat., 599), entitled "An act to provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391). The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

When an application is made under this act a reference to it should be added to Forms 4 and 6. In other respects the application should be prepared according to the preceding regulations.

OIL PIPE LINES.

28. The act approved May 21, 1896 (29 Stat., 127), entitled "An act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming," is similar in its requirements to the right-of-way act of March 3, 1891, and the preceding regulations furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

29. The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe-line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this act shall within twelve months after the location of ten miles of the pipe line if the same be upon surveyed lands; and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file

with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

RESERVOIRS FOR WATERING STOCK.

30. The act approved January 13, 1897 (29 Stat., 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided,* That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

31. Although the title indicates that lands are to be sold for reservoir sites, the act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from

sale after the approval of the map showing the location of the reservoir.

32. Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock, in order to obtain the benefits of the act must file a declaratory statement in the United States land office in the district where the land is located.

33. When the applicant is a corporation it should file also a copy of its articles of incorporation and proofs of its organization, as required in paragraph 5, subdivisions 1, 2, 3, 4, 5, 6, and 11. If these papers are filed with its first declaratory statement, a reference thereto by its number will be sufficient in any subsequent application by the company.

34. The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (page 240), and must contain the following statements:

First. The post-office address of the applicant; the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions (40-acre tracts or lots) of the land sought to be reserved, under no circumstances exceeding 160 acres; that the land is not occupied or otherwise claimed; that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; the business of the applicant, including a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an enclosure or upon unenclosed lands, and also from where and to where they are being driven or transported; the amount and description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir; that no part of the land sought to be reserved is or will be fenced, but the same will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

Second. The location of the reservoir described by the smallest legal subdivisions (40-acre tracts or lots), its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within 2 miles of the land sought to be reserved; and if so, where.

Third. The number, location, and area of all other reservoir sites filed upon by the applicant, especially designating those located in the same county.

35. Upon the filing of such declaratory statements there will be

noted thereon the date of filing over the signature of the officer receiving it, and they will be numbered in regular order, beginning with No. 1. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir declaratory statement, No. —," adding the date of the act. For the filing of such reservoir declaratory statement the local officers will be authorized to charge the usual fees. (Sec. 2238, U. S. Rev. Stat.) The declaratory statement will be forwarded with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

First. No reservation will be made for a reservoir containing less than 250,000 gallons, and for a reservoir of less than 500,000 gallons capacity not more than 40 acres can be reserved. For a reservoir of 500,000 gallons and less than 1,000,000 gallons capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallons and less than 1,500,000 gallons capacity not more than 120 acres can be reserved. For a reservoir of 1,500,000 gallons capacity or more 160 acres may be reserved.

Second. Not more than 160 acres shall be reserved for this purpose in any section.

Third. Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

Fourth. A distance of one-half mile must be left between any two groups of tracts which aggregate more than 160 acres.

Fifth. The local officers will reject any reservoir declaratory statement not in conformity with these rules.

Sixth. Lands so reserved shall not be fenced, but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise inclosed, or if they are not kept open to the free use of any person as aforesaid desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to duly appear, will be canceled and all rights thereunder be declared at an end.

Seventh. Notwithstanding the action of the local officers in accepting any such declaratory statement, the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it does not appear that the declaratory statement is filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

36. The reservoir, if not completed at the date of the act, shall be completed and constructed within two years after the filing of the

declaratory statement; otherwise the declaratory statement will be subject to cancellation.

37. After the construction and completion of the reservoir the applicant shall have the same accurately surveyed and mapped, in accordance with the instructions of paragraphs 7 to 24, inclusive, so far as they are applicable. The map and field notes, which are not to be prepared in duplicate, must be filed in the proper local office. The map must bear Forms 10 and 11 (pages 241 and 242), and the field notes must be sworn to by the surveyor.

38. When the map, field notes, and other papers have been filed in the local office, the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. The maps and papers will then be promptly forwarded to this office.

39. The map and papers will be examined by this office as to their compliance with the law and the regulations, and to determine whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the honorable Secretary, and upon approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act.

40. Upon the receipt of notice of such reservation from this office the local officers will make the proper notations on their records and report the making thereof promptly to this office.

41. In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Form 12 (page 242) will be used for this affidavit. Upon failure to file such affidavit steps will be taken looking to the revocation of the reservation of the lands.

42. If the reservoir is located on unsurveyed land, the declaratory statement may be filed, the lands being described as closely as practicable.

43. The duty of this office in examining the maps and papers of all these applications is to ascertain whether the provisions of the acts of Congress are properly complied with; whether the proposed works are described in such a manner that the benefits to be granted under the various acts are defined so as to avoid future uncertainty; and whether the rights of other grantees of the Government are

properly protected from interference. The above regulations are made for these purposes.

44. The widely different conditions to be considered in the operations proposed by the applicants make it impossible to formulate regulations that will furnish this office with the data necessary in all cases. This office will therefore call for additional information whenever necessary for the proper consideration of any particular case.

PERMISSION TO USE RIGHT OF WAY FOR TELEGRAPH AND TELEPHONE LINES, ELECTRICAL PLANTS, CANALS, AND RESERVOIRS.

45. The act of February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.*

46. This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks in California, for every purpose con-

templated by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and section 1 of the act of May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid, remaining unmodified and not being in any manner extended.*

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the acts referred to, yet considering the general scope and purpose of the act, and Congress having, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as the same pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts. (See pages 215 to 223, inclusive.)

47. It is to be specially noted that this act does not make a grant in the nature of an easement, but authorizes a mere permission in the nature of a license, revocable at any time, and it gives no right whatever to take from the public lands, reservations, or parks, adjacent to the right of way, any material, earth, or stone for construction or other purpose.

48. By section 1 of the act of February 1, 1905 (33 Stat., 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

Under this provision it has been determined that the Department of Agriculture is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve, which occupation or use is temporary in character, and which, if granted, will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued.

Therefore, when it is desired to obtain permission to use a right of way over public lands wholly within a forest reserve, an application should be prepared in accordance with the instructions issued by the Department of Agriculture, and the same filed with the officer in charge of such reserve.

Where, however, permission to use a right of way over lands wholly outside of forest reserves is desired, the application must be prepared and filed in accordance with the regulations contained in paragraphs 5 to 24, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

In case the application involves rights and privileges upon public lands partly within and partly without a forest reserve, separate applications must be prepared and the one affecting lands within the forest reserve filed with the forest officer and the other filed in the local land office.

Application for permission to use the desired right of way through the public lands and parks designated in the act must be filed and permission granted, as herein provided, before any rights can be claimed thereunder. Permission may be given under this act (February 15, 1901) for rights of way upon unsurveyed lands, maps to be prepared in accordance with the requirements of this circular.

49. An affidavit that the applicant is a citizen of the United States must accompany the application, and if the applicant is an association of citizens, each must make affidavit of citizenship, and a complete list of the members thereof must be given in an affidavit by one of them; if not a native-born citizen, the applicant will be required to file the usual proofs of naturalization. The applicant must also set forth in the affidavit the purposes for which the right of way is to be used, and must show that he in good faith intends to utilize the same for such purposes in the event his application therefor is granted.

50. When application is made for right of way for electrical or water plants, the location and extent of ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith must be clearly designated on the map and described in the field notes and forms by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such proposed structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them provided all the others are connected therewith by course and distance shown on the map. The applicant must also file an affidavit setting forth the dimensions and proposed use

of each of the structures and must show definitely that each one is necessary for a proper use of the right of way for the purposes contemplated in the act.

51. Whenever a right of way is located upon any of the national parks designated in the act, the applicant must show to the satisfaction of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated and will not result in damage or injury to the natural conditions of property or scenery existing therein. When the right of way is located in any of the designated national parks, the applicant must file the stipulations and bond required by paragraph 3, and, in the case of a telephone line, an additional stipulation incorporating the following: (5) "That upon completion of telephone lines they shall be subject to the free use of the park officers for all purposes incident to the administration of the park."

52. Whenever right of way within a park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the park.

53. Applications for right of way, under this act, all or any part of which crosses or is located upon any Indian reservation, before being transmitted to the Department will be submitted by the Commissioner of the General Land Office to the Office of Indian Affairs for such action and recommendation thereon as that office may deem proper in so far as the same pertains to such Indian reservation. Applicants will be required to furnish, in triplicate, so much of the map and field notes as relate to that portion of the right of way applied for, if any, within an Indian reservation; and in event the application is subsequently granted, one copy of such portion of the map and field notes as pertains to such reservation will be placed on file in the Indian Office. In this connection, attention is directed to the provisions of section 3 of the act of March 3, 1901 (31 Stat., 1083), which authorizes the granting of permanent rights of way, in the nature of easements, for telegraph and telephone purposes only, through Indian reservations and other Indian lands upon payment of proper compensation for the benefit of the Indians interested therein. The provisions of the latter act and the nature and character of the rights authorized to be secured thereunder differ materially from the provisions contained in this act and the rights authorized to be conferred thereunder. Applicants, therefore, desiring to secure permanent rights of way through Indian reservations or other Indian lands for telegraph and telephone purposes will be required to submit their applications therefor under the act of March 3, 1901, *supra*, in accordance with the then current regulations issued thereunder. (For

existing regulations under said act, see regulations approved March 26, 1901.)

54. All applications for the use of a right of way under this act, through any lands designated therein, for telegraph and telephone purposes, must be accompanied by an official statement from the Post-Office Department showing that the applicant has complied with its regulations under title sixty-five of the Revised Statutes of the United States and amendments thereto.

55. Upon the filing of an application under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map the date of filing over his written signature. If it does not appear that some portion of the public lands or parks designated in the act would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If vacant public land or lands in any park so designated are affected by the proposed right of way, the register will so certify on the map and duplicate over his signature, and will promptly transmit the same to the General Land Office with report that the required notations have been made.

56. Upon receipt of applications for right of way by the General Land Office, the same will be examined and then submitted to the Secretary of the Interior with recommendation as to their approval. Permission to use rights of way through any park designated in the act will only be granted upon approval of the chief officer of the Department under whose supervision such park falls and upon a finding by him that the same is not incompatible with the public interest. If the application, and the showing made in support thereof, is satisfactory, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and it is to be expressly understood, in accordance with the final proviso of the act, that any permission given thereunder may be modified or revoked by the Secretary or his successor, in his discretion, at any time, and shall not be held to confer any right, easement, or interest in, to, or over any public land or park. The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

57. When permission to use the right of way applied for is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way and will note in pencil, opposite each tract

of public land affected, that such permission has been given, the date thereof, and a reference to the act.

TRAMROADS.

58. The Secretary of the Interior is authorized to permit the use of rights of way for tramroads through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation under the provisions of the act of Congress of January 21, 1895 (28 Stat., 635), as amended by section 1 of the act of May 11, 1898 (30 Stat., 404). The act of January 21, 1895, *supra*, entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation, for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

This act was amended by section 1 of the act of May 11, 1898, *supra*, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limit thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses."

59. Applications for permission to use rights of way for tramroads should be prepared and filed in accordance with the regulations hereinbefore prescribed relative to presentation of applications for rights of way under the act of February 15, 1901, and the then current regulations issued under the general railroad right-of-way act of March 3, 1875 (for existing regulations under the latter act see 32 L. D., 481), the prescribed forms in such regulations being so modified as to

specify and relate to the acts under which the application is made. It is to be specially noted that the acts relating to tramroads do not authorize the granting of permission to use rights of way for such purpose within the limits of any park, forest, military, or Indian reservation, and it is to be further noted that permission to use rights of way for tramroads over public lands, when granted, only confers a right in the nature of a license and is subject to all the conditions and limitations hereinbefore stated in paragraph 56 of these regulations.

RIGHT OF WAY OVER FOREST RESERVES FOR DAMS, RESERVOIRS, WATER PLANTS, DITCHES, FLUMES, PIPES, TUNNELS, AND CANALS FOR MUNICIPAL OR MINING PURPOSES.

60. Section 4 of the act of Congress approved February 1, 1905 (33 Stat., 628), reads as follows:

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

61. This act grants rights of way through forest reserves to citizens and corporations of the United States for the objects therein specified, during the period of their beneficial use, under rules and regulations to be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

All applications for the right of way for the purposes set forth in said act, must be submitted thereunder in accordance herewith.

62. The right granted is not in the nature of a grant of lands, but is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the act, during the period of the beneficial use. When the use ceases, the right terminates and thereupon proper steps will be taken to revoke the grant.

No right, whatever, is given to take from any part of the reservation any material, earth, or stone for construction or other purposes, nor does it give any right to use any land outside of what is actually necessary for the construction and maintenance of the works.

63. Applications for right of way under this act should be made in the form of a map and field notes, in duplicate, and must be filed in the local land office for the district in which the land traversed by the right of way is situate; if in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. The maps, field notes, evidence of water rights, etc.,

and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with paragraphs 4 to 23, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

64. An affidavit that the applicant is a citizen of the United States must accompany the application, and if the applicant is an association of citizens, each must make affidavit of citizenship, and a complete list of the members thereof must be given in an affidavit of one of them. A copy of their articles of association must also be furnished, or if there be none, the fact must be stated over the signature of each member of the association.

If the applicant is not a native-born citizen, he must file the usual proof of naturalization. The applicant must set forth in the affidavit the purposes for which the right of way is desired.

65. When application is made for right of way for water plants, the location and extent of ground proposed to be occupied by buildings, or other structures necessary to be used in connection therewith, must be clearly designated on the map and described in the field notes and forms by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all others are connected therewith by course and distance shown on the map.

The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures and must show definitely that each is necessary to a proper enjoyment of the right of way granted by the act.

66. The applicant must file with each application under this act a stipulation, under seal, incorporating the conditions set forth in subdivisions 1, 2, 3, and 4 of paragraph 3.

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and

must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of the bond will be furnished and the amount fixed.

No construction can be allowed on the reservation until an application for right of way has been regularly filed in accordance herewith and has been approved by the Department, or has been considered and permission specifically given by the Secretary of the Interior.

67. Upon the filing of an application, under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map the name of the land office and the date of the filing over his written signature.

If it does not appear that some portion of the public lands in reserve would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If unpatented lands are affected by the proposed right of way, the register will so certify on the map and duplicate, over his signature, and will promptly transmit the same to the General Land Office, with report that the required notations have been made.

68. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the right of way as laid down on the map. They will also note the approval in ink on the tract books, opposite each legal subdivision affected, with a reference to the act mentioned on the map.

W. A. RICHARDS,
Commissioner.

Approved: September 28, 1905.

THOS. RYAN,
Acting Secretary.

FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS.

FORM 1.

I, _____, secretary (or president) of the _____ Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 19—.

[Seal of company.]

— of the _____ Company.

FORM 2.

I, _____, do certify that I am the president of the _____ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 190—.

[Seal of company.] _____,

President of the _____ Company.

FORM 3.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the _____ Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir for which right of way is asked, as required by paragraph 23, being a total length of canals, ditches, and laterals of _____ miles, and a total area of reservoirs of _____ acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commenced on the _____ day of _____, 19—, and ending on the _____ day of _____, 19—, " [and that the survey of the said (canal, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir)], and that such survey is accurately represented upon this map and by the accompanying field notes. " [And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.]

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.] _____,

Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ Company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field

* This clause to be omitted in applications for telephone and telegraph lines.

notes, was adopted by the company, by resolution of its board of directors, on the — day of —, 19—, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows—(describe as in Form 3)—^a [and that no lake or lake bed, stream or stream bed is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map]; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of ^b (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right of way herein described is desired for the main purpose of irrigation.^c

Attest:

[Seal of company.]

_____,
President of the _____ Company,

_____,
Secretary.

FORM 5.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the _____ Company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in paragraph 23) a total length of constructed (canals, ditches, and laterals) of _____ miles, and a total area of constructed reservoirs of _____ acres; that construction was commenced on the — day of —, 19—, and completed on the — day of —, 19—; that the constructed (canals, ditches, laterals, and reservoirs), as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the — day of —, 19—.

Sworn and subscribed to before me this — day of —, 19—.

[SEAL]

_____,
Notary Public.

FORM 6.

I, _____, do certify that I am the president of the _____ Company; that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the — day of —, 19—; and that the company has in all things complied with the requirements

^a This clause to be omitted in applications for telephone and telegraph lines.

^b Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891 and 1898.

^c Or, where filed under other acts than that of 1891 and 1898, state the purposes for which right of way is applied for.

of the act of Congress^a (March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States).

Attest:

[Seal of company.]

_____,
President of the _____ Company.

_____,
Secretary.

FORM 7.

[Under act February 15, 1901.]

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed by) the _____ company, under whose supervision the survey was made of the grounds selected by the company for structures for electrical purposes under the act of Congress approved February 15, 1901, said grounds being situated in the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian; that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat., 790).

_____,
Chief Engineer.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL.]

_____,
Notary Public.

FORM 8.

[Under act of February 15, 1901.]

I, _____, do hereby certify that I am the president of the _____ company; that the survey of the structures represented on the accompanying drawing was made under authority and by direction of the company, and under the supervision of _____, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying drawing actually represents the structures required in the _____ quarter of the _____ quarter of section _____, of township _____, of range _____, _____ principal meridian, for electrical purposes, under the act of Congress, approved February 15, 1901; and that the company, by resolution of its board of directors, passed on the _____ day of _____, 19____, directed the proper officers to present the said drawing for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat., 790).

_____,
President of the _____ Company.

[Seal of the company.]

Attest:

_____,
Secretary.

^a Here insert the description of the act of Congress under which the application is made, when filed under some other act than that of 1891.

FORM 9.

Reservoir declaratory statement.

[Under act of Jan. 13, 1897 (29 Stat., 484).]

RES. D. S. }
No. ——— }.LAND OFFICE AT ———,
—————, ———, 19——.

I, ———, of ———, do hereby certify that I am president of the ——— company, and on behalf of said company, and under its authority, do hereby apply for the reservation of land in ——— County, State of ———, for the construction and use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat., 484). The location of said reservoir and of the land necessary for its use, is as follows: ——— of section ——— in township ———, of range ——— M., containing ——— acres

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of

The land owned or claimed by the applicant within the vicinity of the said reservoir (within three miles) is as follows: ———.

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

The water of said reservoir will cover an area of ——— acres, in ——— of section ———, in township ———, of range ——— of said lands; the capacity of the reservoir will be ——— gallons, and the dam will be ——— feet high. The source of the water for said reservoir is ———.

and there are no streams or springs within two miles of the land to be reserved except as follows: ———.

The applicant has filed no other declaratory statements under this act except as follows:

No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.
 No. ———, ——— land office, area to be reserved ——— acres.

Total, ——— acres, of which Nos. ——— are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in

accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[Seal of company.] _____

Attest:

Secretary.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

Sworn to and subscribed before me this _____ day of _____, in the year 19—.

[SEAL.] _____

Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

LAND OFFICE AT _____,

_____, 19—.

I, _____, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Fees, \$— paid. _____

Register.

The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899.

FORM 10.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the person who was employed to make the survey of a reservoir covering an area of _____ acres, the initial point of the survey being _____ (here describe as required by paragraph 23); said reservoir having been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian, as proposed by reservoir declaratory statement, No. _____, which was filed in the local land office at _____, under the provisions of the act of January 13, 1897 (29 Stat., 484); that the said survey was made on the _____ day of _____, 19—; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of _____ gallons, and at the time of said survey contained _____ gallons of water.

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.] _____

Notary Public,

FORM 11.

I, _____, do certify that I am the president of the _____ company which filed (or that I am the person who filed) reservoir declaratory statement, No. _____, in the local land office at _____; that the reservoir proposed has been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian, covering an area of _____ acres, the initial point of the survey being _____ (describe as in Form 10); that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purposes, and in the manner prescribed by the said act of January 13, 1897 (29 Stat., 484), the provisions of which have been and will be complied with in all respects.

[Seal of company.]

_____,
President of the Company.

Attest:

_____,
Secretary.

FORM 12.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, deposes and says that he is the president of the _____ company which filed (or that he is the person who filed) reservoir declaratory statement, No. _____, in the local land office at _____; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that water has been kept therein to the extent of not less than _____ gallons during the entire calendar year of 19—; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years, and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat., 484).

_____,
President of _____ Company.

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.]

_____,
Notary Public.

PRIVATE ENTRY—ACT OF AUGUST 30, 1890.

LESTER B. ELWOOD.

The provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired by any one person, under the public land laws, to 320 acres, has no application to private cash entries made under the provisions of section 2354 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 2, 1905.* (E. F. B.)

With your letter of August 10, 1905, you transmit the appeal of Lester B. Elwood from the decision of your office of May 15, 1905,

holding for cancellation private cash entries of lands in the State of Missouri made by sundry purchasers, whose names with a description of the lands respectively entered are fully described in your said decision of May 15, 1905.

These entries were made at the instance of A. R. Jackson, as agent for C. A. Brickman, who transmitted to the local officers at Booneville, Missouri, the applications of the several entrymen in one envelope, with one draft covering the various purchases. There was no concealment of the fact that Jackson was securing the title to these lands at private cash entry as agent for C. A. Brickman and had the cash certificates issued to the persons named in the several applications for the tracts respectively applied for. They were subsequently purchased by appellant, who now holds the title to them.

You directed an investigation for the purpose of determining whether the entrymen were seeking the lands for their own benefit or were acting for others, either directly or indirectly. Upon being advised of the facts above stated, you held the entries for cancellation, for the reason that the law limits the area to 320 acres in the aggregate which any one person may acquire of the non-mineral public lands.

The lands in question were public lands in the State of Missouri and at the time of the issuance of the final certificate were subject to sale at private cash entry under section 2354, Revised Statutes, which provides that—

All the public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections.

The act of March 2, 1889 (25 Stat., 854), withdrew from private cash entry all public lands except in the State of Missouri, and to further provide for the disposal of public lands in said State at private cash entry the act of May 18, 1898 (30 Stat., 418), abolished the distinction between offered and unoffered lands, and by the second section of said act it provides—

That all public lands within the State of Missouri shall hereafter be subject to disposal at private sale in the manner now provided by law for the sale of lands which have been publicly offered for sale, whether such lands have ever been offered at public sale or not: *Provided*, That the actual settlers shall have a preference right, under such rules and regulations as the Secretary of the Interior may prescribe.

By that provision all public lands in the State of Missouri, whether offered or unoffered, were subject to sale at private cash entry under the provisions of section 2354 in the same manner and to the same extent as when that section was applicable in all the public land states, the only restriction upon the right being that actual settlers

shall have a preference right under such rules and regulations as the Secretary of the Interior may prescribe.

The instructions issued under that act are contained in the circular of June 10, 1898 (27 L. D., 68), which provides that—

In all applications to purchase land at private sale made after the passage of this act, the applicant must furnish a duly corroborated affidavit showing that there is no one other than himself claiming said land as an actual settler. In other respects you will take action under existing regulations, treating all public lands as unoffered.

There is nothing in the circular requiring the purchaser to show that he desires the lands for himself or that prevents the purchase being made through an agent. All that he is required to show is that there is no other than himself claiming the land as an actual settler. If there is no settler claiming a preference right the applicant may purchase whether he is a settler or not.

In this case the land was not entered with a view to occupation, entry or settlement under any of the land laws that limit the quantity that any one person may acquire under such laws, but to purchase it at private cash sale, and there is nothing in the act or law under which the purchase was made that limits or restricts the purchaser to quantity.

You held that the right of purchase at private cash entry was restricted by the act of August 30, 1890 (26 Stat., 391), providing that—

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws; but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement is validated by this act.

That act has been construed by the 17th section of the act of March 3, 1891 (26 Stat., 1095), to refer to agricultural lands and not lands entered under the mineral law, but it is evident that the act of August 30, 1890, and the explanatory act of March 3, 1891, had reference to lands under the general land laws that limit the quantity that may be taken under one entry and not to purchasers at private cash entries under laws that contain no restriction whatever as to quantity. That question is settled by the principle that controlled in the decision of the Department in the case of John W. Clarkson (31 L. D., 399) and Instructions (33 L. D., 606).

As it appears from the statement in your letter that the affidavit required by the circular appears with each of the entries, your decision holding them for cancellation is reversed.

ISOLATED TRACTS CONTAINING LESS THAN FORTY ACRES—SUSPENSION OF APPLICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 4, 1905.

Registers and Receivers, United States Land Offices.

SIRS: In departmental order of September 26, 1905 [not reported], suspending certain islands from disposal, it was said:

This suspension is made with a view to submitting to Congress the question whether some provision should not be made for the disposal of small and isolated tracts other than is provided for by the general land laws now in force where it is evident that such tracts are not adapted for the use and purposes contemplated by such laws.

In compliance with this order, you are directed to receive and suspend, without further action, all applications to enter, select, purchase, or locate, isolated and disconnected tracts, presented after November 15, 1905, which embrace less than forty acres, until you receive further instructions from this office.

This order is not intended to affect entries made under the act of June 17, 1902, commonly known as the reclamation act.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

SCHOOL LAND—INDEMNITY SELECTION.

STATE OF CALIFORNIA.

The requirement in rule 2 of the instructions of March 6, 1903, that with each list of indemnity school selections "a certificate of the proper authorities that the base lands have not been sold, encumbered, or otherwise disposed of," shall be furnished by the State, adhered to.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 4, 1905.* (G. B. G.)

This is the appeal of the State of California from your office decision of April 17, 1905, holding that, in compliance with departmental instructions of February 21, 1901 (30 L. D., 491), and March 6, 1903 (32 L. D., 39), the State must file with each list of indemnity school selections a certificate from the county recorder as to the status of the base lands offered in support of the selection.

Section 2 of the instructions of February 21, 1901, *supra*, which

relate to selections on account of losses or waivers of base lands in forest reservations, provides:

The State will be required to file with each list of selections a certificate by the officer, or officers, charged with the care and disposal of such school lands, that the State has not encumbered, sold or disposed of, nor agreed to encumber, sell or dispose of, any of the said lands, used as bases, and that no part of said lands is in the possession of any third party, under any law of permission of the State. There must also be filed with all lists a certificate from the recorder of deeds, or official custodian of the records of transfers of real estate in the proper county, that no instrument purporting to convey or in any way encumber the title to any of said lands, is on file or of record in his office.

Rule 2 of the instructions of March 6, 1903, *supra*, which relate to selections based on losses because of the alleged mineral character of the base lands, provides that the State shall furnish "a certificate of the proper authorities that the base lands have not been sold, encumbered or otherwise disposed of."

It is submitted on behalf of the State that these conditions are unreasonably burdensome and in some instances prohibitory, and requested that they be modified.

The regulations in question received most careful consideration. It was thought then, and upon further consideration is still believed, that nothing less than therein required would adequately safeguard the interests of the United States in the matter of these indemnity selections. If, as suggested on behalf of the State of California, county recorders in that State may charge unreasonable fees for these certificates, the situation for that State is unfortunate, but no satisfactory relief suggests itself to this Department. Other States are complying with these regulations, and from informal inquiry in your office it satisfactorily appears that from the standpoint of the interests of the United States the rule should not be relaxed in the interests of the State of California.

The decision appealed from is affirmed.

SWAMP GRANT—CHARACTER OF LAND—EFFECT OF PATENT.

STATE OF LOUISIANA.

The issuance of patent upon entries embracing lands alleged by the State to have passed to it under its swamp land grant terminates the jurisdiction of the land department thereover; and any question as to the character of the lands and whether the issuance of patent therefor was inadvertent will be inquired into only for the purpose of determining whether recommendations should be made for the institution of suit to set aside the patent. The question as to whether the issuance of patent amounted to an adjudication that said lands were not swamp, and therefore did not pass to the State under its grant, is one for determination by the courts, and not by the land department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 4, 1905. (G. B. G.)

This is the appeal of the State of Louisiana from your office decision of January 14, 1905, holding for rejection the State's claim under its swamp land grant to numerous tracts of land in the New Orleans land district, specifically described in said decision.

It appears from the papers accompanying the appeal, or from the files of your office, that all of the tracts involved have been entered, located, or sold under the public land laws, and that patents have issued therefor to the claimants under those laws, the latest of which issued more than ten years ago. It further appears that the claim of the State under its swamp grants was made in apparent compliance with regulations then in force, after the dates of said entries, locations, and sales, but before the issuance of patent.

The decision of your office is put upon the ground that the issuance of these patents under this state of facts was in law an adjudication that said land was not swamp, and therefore did not pass under the grants of swamp lands to the State. It is urged upon the appeal that there was in law and fact no such adjudication; that the State's claim to these lands has never been considered, much less adjudicated, by the land department; that the records and files of your office contain conclusive documentary evidence that said lands are, and were, swamp and overflowed lands within the meaning of said grants; and it is asked that your office be directed to certify to the Department the necessary data to establish these facts, and that the Secretary of the Interior render a decision upon the swampy or non-swampy character of said lands.

It is not believed that the land department or the Secretary of the Interior, as the official head thereof, has jurisdiction over the land involved for any purpose. The issuance of the patents aforesaid transferred that jurisdiction to the courts. The question as to the character of these lands and the inadvertent issue of patent therefor—if, indeed, such action was inadvertent—would only be cognizable here for the purpose of ascertaining whether recommendation should be made to the Department of Justice for the institution of suits to set aside the patents. This question has been settled by lapse of time. More than six years have elapsed since the last of these patents issued, and under the limitation placed on actions of the sort suggested, by section 8 of the act of March 3, 1891 (26 Stat., 1093, 1095), the action could not be maintained. The question whether the issuance of these patents amounted to adjudications upon the character of the lands is one for the courts, if it be made the subject of further inquiry, and such inquiry can only be had upon an action or actions by the State itself, or persons claiming through the State. Whatever may be the

purpose of the State in asking this Department to make a specific finding as to the character of these lands, it will be enough to say that, if such finding in law has not already been made, the courts offer a forum for the adjudication of that question.

The decision appealed from is affirmed.

LANDS IN ROUND VALLEY INDIAN RESERVATION OPENED TO SETTLEMENT AND ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., November 7, 1905.

REGISTERS AND RECEIVERS,

San Francisco and Eureka, California.

GENTLEMEN: The act of February 8, 1905 (33 Stat., 706), provides for the survey and reappraisal of all the lands, relinquished from the Round Valley Indian Reservation in the State of California under the act of October 1, 1890 (26 Stat., 658), which had not been theretofore disposed of; and that the said lands, when surveyed and appraised, shall be subject to settlement and entry under the provisions of the homestead laws of the United States.

Said lands having been surveyed and reappraised in accordance with the provisions of said act and said reappraisal having been approved by the Secretary of the Interior, the hour of 9 o'clock a. m., January 15, 1906, has been fixed as the time on and after which the lands described in the schedule hereto attached will be opened to settlement and entry.

The lands will be subject to settlement and entry under the homestead laws and the right of commutation under section 2301, Revised Statutes, is expressly conferred by the act; they will be subject to entry under section 2306, R. S., by those entitled to make entry thereunder, as the law does not limit entries to actual settlers, but in case entry is allowed under said section 2306, the entryman will be required to make payment of the appraised price for the lands embraced therein; and declaratory statements under section 2309 may also be filed by those entitled under section 2304, Revised Statutes, to make the same.

Applicants for these lands must possess the qualifications required in the case of ordinary homestead entries, and all applications to enter presented prior to April 16, 1906, must, in addition to the usual affidavits required therein, be accompanied by an affidavit alleging that there is no person having a superior right to the land desired, as a settler thereon and an occupant thereof on January 1, 1904.

Persons claiming a preference right of entry by reason of settlement and occupation of said lands on January 1, 1904, must exercise that right by making application to enter before April 16, 1906, as the lands to occupied will, after that date, become subject to entry by any other qualified person. You will require of all persons claiming a preference right of entry, by reason of such settlement and occupation, a special affidavit, duly corroborated, setting forth all the facts as to such settlement and occupation of the lands claimed by them, and showing that their settlement and occupation has continued until the date of their applications to enter.

Each entryman is required to pay the appraised price for the lands entered by him, such payment to be made in five equal annual payments, one-fifth at the time of entry and one-fifth in one, two, three, and four years, respectively, from the date of entry, with interest on the deferred payments at the rate of 5 per cent per annum.

In case of commutation of an entry, the appraised price must be paid at the time of submission of proof, the entryman receiving credit for any payments previously made, and, if the entryman be an alien who has declared his intention to become a citizen, such proof will not be accepted unless accompanied by proof of full naturalization. When parties, who are entitled, under the provisions of section 2305, Revised Statutes, to credit upon the period of residence for military service, submit proof before the end of the fifth year from date of entry, they will be required to make payment in like manner of the full amount of purchase money remaining unpaid for the lands embraced in their entries.

The usual fee and commissions now provided by law where the price of the land is \$1.25 per acre must be paid at the time of original entry and when the commutation or final proof is made, but you will not collect any payment for lands in excess of 160 acres embraced in an allowed original entry, as the payment of such excess will be included in the whole amount required to be paid by installments.

Cash receipts (Form 4-140a) in duplicate, will be issued for the installments of the purchase money when paid. When final proof and payment are made, a final certificate (Form 4-196) and a final homestead receipt (Form 4-140) will be issued in addition to a cash receipt (Form 4-140a) for the final payment. When commutation proof and payment are made, you will issue a cash receipt (Form 4-189) and a cash receipt (Form 4-131) for the payment of the purchase price, noting thereon the receipt of final commissions.

All homestead entries for these lands will be indorsed "Round Valley Reservation lands," and you will open a new series therefor, commencing with Number 1, and the same will be reported on sepa-

rate abstracts. The cash certificates and receipts will be indorsed in like manner and numbered in their proper order in the Round Valley Reservation cash series. You will report and account for the money received on account thereof in separate monthly and quarterly returns.

A separate account should also be rendered for homestead fees and commissions as received on "Round Valley Reservation lands."

The receiver will deposit all moneys received from the sale of said lands in the Treasury of the United States as receipts from sales of "Round Valley Reservation lands," act of February 8, 1905; he will also deposit all homestead fees and commissions so received as from "Round Valley Reservation lands," but to the credit of the United States the same as fees and commissions received on account of public lands of the United States.

The lands of said reservation now to be opened are not affected by the provisions of the act of May 17, 1900 (31 Stat., 179), for the reason that they were not "opened to settlement" prior to the passage of said act.

All persons who have since attempted, or who may hereafter attempt, to make settlement on any of said lands prior to the hour the lands are formally opened to settlement and entry, as above set forth, will be considered and dealt with as trespassers, and preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

It may be, and possibly will occur, that at the time of opening a number of persons will be assembled at your office seeking to make entry of these lands, and the duty will devolve upon you to make and enforce such rules and regulations as may be necessary to secure a fair and orderly course of proceedings on the part of all concerned.

The transmission of applications by mail is permissible, but it was not intended to confer upon such applicants a superior right.

You will, therefore, upon opening your office, note the number of persons in line, and act upon their applications in the order of presentation. After acting upon all applications of those who were in line at the opening of your office, you will act upon all applications received by you by mail on that morning in the order in which you may happen to open them and then proceed with the applications of those who may have formed in line after the opening of your office. Any applications received in subsequent mails should be considered in the actual order in which the letters containing them are opened, after all applications of those who are in line at time of their receipt have been acted upon. (See 27 L. D., 113, and 33 L. D., 582.)

Such of the persons who may be acting as agents for ex-soldiers

under section 2309, Revised Statutes, will be allowed to make one entry in his individual character and to file one declaratory statement as agent, if properly authorized, and if desiring to make other filings, you will require him to take his place at the end of the line and await his proper time before doing so, and he will be allowed to file but one declaratory statement at a time.

After the disposition of applications presented by persons present at 9 o'clock a. m., all other applications presented will be disposed of in the usual way, the time of actual presentation being noted on the application.

You are expected to act promptly under the lawful instructions before you as occasions arise, allowing any parties feeling aggrieved by your action the right of appeal, under the rules of practice, without seeking special instructions from this office in the particular cases before acting thereon.

Notices for publication have been forwarded to the newspapers in which they are to be published.

You will at once make requisition for such blank forms as you will need in connection with the entry of these lands. Printed copies of these instructions for distribution will be forwarded to you as soon as practicable.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved, November 7, 1905.

E. A. HITCHCOCK, *Secretary.*

[Schedule omitted.]

HOMESTEAD ENTRY—FEES AND COMMISSIONS.

WALTER C. FRAZER.

An applicant to make homestead entry is not entitled to have the fees and commissions paid by him upon a prior homestead entry, canceled for conflict, applied in payment of the fees and commissions required in connection with his second application; but, upon proper application therefor, the fees and commissions paid upon the canceled entry will be repaid under the provisions of section 2 of the act of June 16, 1880.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 7, 1905.* (J. L. M'C.)

Walter C. Frazer has filed a motion for review of departmental decision (unreported) of May 24, 1905, affirming that of your office, dated December 6, 1904, which sustained the action of the local officers

in rejecting his application to make homestead entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 10, T. 4 N., R. 23 E., Woodward land district, Oklahoma.

The ground of rejection was that Frazer failed, and still refuses, to pay the fees and commissions (fourteen dollars) due on said entry. He had previously made entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 10, same township and range; but upon discovery that such entry had been erroneously allowed, because of being in conflict with the prior entry of another person, Frazer relinquished it and applied to make entry of the tract in question; and he contends that the fees and commissions paid on the first entry should apply on his second entry—not being satisfied with paying the fees and commissions on the second entry and being repaid those erroneously paid on the first entry. The movant says:

Not having been advised of the reasons of the recent action on the part of the Honorable Secretary, or informed of the grounds on which the General Land Office sustained the action of the local land office, the appellant labors under the disadvantage of not knowing how the Honorable Secretary can possibly reach the conclusion he does in the premises.

Probably the several tribunals referred to considered the reasons for the action taken to be so palpable that there was no occasion for explaining them *in extenso*. It will be sufficient to say that the action of the local officers was in strict accordance with the departmental instructions of December 1, 1883 (2 L. D., 660):

The practice of allowing parties making a homestead or timber-culture entry credit for the fee and commissions paid by them on a canceled prior entry is discontinued. The fees and commissions paid on entries of the above mentioned character canceled for conflict, or because they have been erroneously allowed and can not be confirmed, will be repaid to the proper parties upon their making application therefor, as provided in the second section of the act of Congress, approved June 16, 1880.

The preceding instruction has been strictly followed ever since its promulgation, and good practice requires that it should continue to be followed.

The motion for review is overruled.

INDIAN LANDS—ALLOTMENT—MARRIED WOMAN.

THOMPSON *v.* FRAZIER.

Where an Indian woman, a member of one tribe, marries an Indian man, a member of another tribe, but is never enrolled as a member of her husband's tribe, she is entitled to an allotment in her own tribe, as the head of a family, notwithstanding her husband, prior to his marriage, received an allotment in his tribe as a single person.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 7, 1905. (C. J. G.)

Miner Thompson has appealed from the decision of your office of December 1, 1904, involving charges preferred by him against Ponca Indian allotment No. 37, made to Hannah H. Frazier, for the N. $\frac{1}{2}$ of Sec. 14, T. 32 N., R. 7 W., O'Neill, Nebraska.

Section 13 of the act of March 2, 1889 (25 Stat., 888, 892), provides, among other things, as follows:

Each member of the Ponca tribe of Indians now occupying a part of the old Ponca reservation, within the limits of the said Great Sioux reservation, shall be entitled to allotments upon said old Ponca reservation as follows: To each head of a family, three hundred and twenty acres.

In an affidavit filed in the local land office April 1, 1902, Thompson alleged that Hannah H. Frazier, the allottee, was a Ponca Indian married to a Santee Sioux Indian at the date her allotment was made, and was therefore not entitled to the same as the head of a family, under the foregoing section. This affidavit was referred by your office to the Commissioner of Indian Affairs, who returned the same under date of July 14, 1902, with this statement:

The fact that this allottee was the wife of a Santee Sioux Indian at the time the allotment was made is not denied by this office. . . . The only question at issue in this case is, was this woman the wife of a Santee Sioux Indian, the head of a family within the meaning of said section 13. This office has held in its instructions to allotting agents that where the husband was a white man, or not a member of the tribe to which his wife belonged, the wife should be regarded and allotted as the head of a family, and this ruling was followed in making the allotments to the Ponca Indians.

As to this woman, however, the Department held in a communication addressed to this office December 1, 1897, as follows:

"These Indian women have been, through error, allotted lands which they are not entitled to, and steps should be taken to cancel their allotments, if not gone to patent, or to obtain their relinquishment, or to set aside the patent by action of the courts."

In view of this proceeding, it is presumed that you should order a hearing to be had in the proper local land office in accordance with the rules of practice governing proceedings of such offices.

March 2, 1903, your office ordered a hearing, which was had, and as a result thereof the local officers recommended dismissal of Thompson's charges and that the allotment be held intact. Upon appeal your office rendered the decision here complained of, in which it was found, in view of the departmental ruling referred to, that the allotment to Hannah H. Frazier was illegal, but held said allotment intact owing to the provisions of the act of April 23, 1904 (33 Stat., 297), which inhibits the cancellation of allotments upon which first or trust patents have issued, except in certain specified instances, of which this case is held by your office not to be one.

The Commissioner of Indian Affairs in a letter of date February 24, 1890, addressed to the agent of Santee Agency, Nebraska, with respect to this allottee, instructed said agent as follows:

Harriet [Hannah] H. Frazier married Charles Frazier, a Santee Sioux Indian, who has had 160 acres of land patented to him at Santee Agency. They had one child, Harriet. Would she (Harriet [Hannah] H. Frazier) be entitled to 160 or 320 acres?

Harriet [Hannah] H. Frazier should be regarded as the head of a family and allowed 320 acres. He husband being an Indian of another tribe has no land rights on the old Ponca Indian reservation. Had she married a white man she would have been regarded as the head of a family (the white father having no rights) and the same rule should govern in view of the fact that her Indian husband is not of her tribe and has no land rights on the old Ponca reservation. She should not be deprived of her just rights because her Indian husband happens to own property elsewhere.

Like instructions were given in the same letter as to other Indians. As to one, Alice Howe, who had recently married a Flandreau Sioux, it was said that she should be regarded as the head of a family and given 320 acres.

In a communication to the Commissioner of Indian Affairs of date November 4, 1897, the agent of the Santee Agency stated, as set forth in a letter of the Commissioner of Indian Affairs of date November 29, 1897, that—

certain Santee Indians married women belonging to the Ponca tribe before allotments were made to the Santees in 1885; that land was allotted to these men as heads of families, their wives being enrolled with them; that the men have received their full share of the benefits provided by section 17 of the Sioux Act of March 2, 1889 (25 Stat., 888), and that in 1890 the wives of these men were allotted 320 acres each, as members of the Ponca tribe and heads of families.

The agent asked if these women were entitled to the benefits under said section 17, and also stated that—

Charles Frazier married Hannah Howe, a Ponca, about 2 years after he was allotted land at Santee in 1885, and when land was allotted at Ponca in 1890 she was allotted 320 acres and her child an allotment of about 63 acres; that Hannah Frazier has never been on the Santee rolls with her husband, but is enumerated on the Ponca census roll, it being the intention of Frazier and his wife to move on the Ponca allotment in the spring and make a home thereon.

The agent asked if he would be justified in paying Hannah Frazier under said section 17, and the Commissioner of Indian Affairs, in transmitting the agent's communication to the Department, said:

So far as the first named cases are concerned, I have to state that where a man and his wife are members of different tribes it has been the practice of this office to allow each an allotment as a single person with the tribe to which they respectively belong or to allow either of them to take an allotment as the head of a family on the reservation to which said allottee belonged, the other not being entitled to an allotment. Under this practice it would seem that these

Ponca women were not entitled to allotments with the Ponca tribe, as under the Sioux Act married women are not entitled to allotments. If this be true I am of the opinion that they would not be entitled to the benefits of section 17.

From the schedule of Santee allotments approved by the Department May 1, 1885, it appears that Charles Frazier was assigned 160 acres of land under the 6th article of the Sioux treaty of 1868 (15 Stats., 637). It is therefore doubtful whether his wife, Hannah Howe, was entitled to an allotment as a member of the Ponca tribe. As the decision of the Department of July 21, 1896, places an interpretation upon section 17 of the Sioux Act somewhat different from that entertained by this office, I deem it proper to submit these questions for your consideration and decision before instructing Agent Clements in the premises.

It was in reply to this letter of the Commissioner of Indian Affairs that the Department, after quoting from section 17 of the Sioux act, used the language quoted by the Commissioner in his letter to your office of date July 14, 1902, hereinbefore referred to, and which led your office to hold that the allotment in question was illegal. It will be observed, however, that the finding of the Department that the allotments to these Ponca women were erroneous, was made to cover without distinction both cases mentioned by the Indian agent. The one case included Ponca women who had married members of the Santee tribe and had been enrolled with them, prior to the allotments to their husbands as heads of families; and these women were afterwards allotted as members of the Ponca tribe and also as heads of families. As to the correctness of the departmental ruling with respect to this class it is unnecessary to say anything here, except to state that it differs materially from the other case named by the agent, which is that of the Ponca woman, Hannah H. Frazier, who married a Santee Indian about two years after he had received an allotment as a member of the Santee tribe and as a single person, and who was never on the Santee rolls with her husband but continued to be borne on the Ponca roll, she being finally allotted land as a member of the Ponca tribe and as the head of a family.

The appeal of this case here is directed solely to the holding of your office that under the act of April 23, 1904, there is no authority to cancel the patent issued to Hannah H. Frazier. But the contention is also made, as otherwise appears from the record, that if it be found the allottee and her husband were both citizens of the United States at the time the allotment was made, then she was not the head of a family and so not entitled to an allotment. This might be true had the allottee married an Indian homesteader, a citizen of the United States, and sought an allotment out of the public domain; but the lands involved here are tribal properties and are not governed by the provisions of the general allotment act with respect to citizenship. Besides, in section 11 of the Sioux act it is provided:

And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven.

Said section 6 (24 Stat., 388, 390), declares, among other things, the citizenship of allottees, "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." By analogy, in the case of Frank Bergeron (30 L. D., 375), it was held that an Indian who has received an allotment of his proportionate share of the land held in common by his tribe, is not thereby disqualified from taking land for a homestead as a citizen of the United States. In the decision of your office here complained of it is said:

In a letter dated November 26, 1902, addressed to this office by the Commissioner of Indian Affairs in regard to the allotment of Julia A. Glick, referred to above, it was stated that Julia A. Glick, who married a white man, was, under section thirteen of the act of March 2, 1889, entitled to an allotment, she being a member of the Ponca tribe, and the Department having uniformly held that a woman whose husband is a white man, or otherwise not entitled to an Indian allotment, is to be regarded as the head of an Indian family. It is further stated that the land allotted to Mrs. Glick was not the property of the United States but of the tribe to which she belongs, and that her rights to tribal property are not impaired by her marriage to a white man.

If a Ponca Indian who has married a white man is entitled to an allotment of 320 acres on the Ponca reservation as the head of a family, it is not seen why Hannah Frazier should not occupy the same position, she having married a Santee Sioux Indian who was not allotted as the head of a family, but who became prior to her marriage a citizen of the United States.

The Department is of opinion that the ruling relied upon by your office is not conclusive of nor properly applicable to the case now under consideration, but that the former practice in regard to such cases was the proper one and should be followed; and that on the merits of this case alone the charges preferred against the allotment of Hannah H. Frazier should be dismissed.

There are other reasons, however, sufficient to justify the dismissal of these charges. In the first place no matters were alleged against the allotment that were not already within the knowledge of the Indian Office; hence no information was given that was not already well known. In the second place, persons making charges against an Indian allotment do not acquire a preference right of entry in the event of the cancellation of the allotment. And in the third place, since the passage of the act of April 23, 1904, there is no authority to cancel a patent issued to an Indian allottee, except in specified instances, without the approval of Congress. As this case does not come within the provisions of the act, and as it is not deemed a proper case to submit to Congress under said act, the decision of your office herein is modified accordingly, the charges in question will be dismissed and the allotment held intact.

SETTLEMENT—LANDLORD AND TENANT.

McNAMARA *v.* MORGAN.

The rule that settlement rights can not be acquired by the tenant or employe of another which can be set up to defeat intervening rights, is not applicable in all cases where the relation of landlord and tenant is established, and should never be extended to cases where the relation of tenant was assumed merely for the purpose of protecting settlement rights and in furtherance of a *bona fide* intention on the part of a settler to assert his rights at the first opportunity.

No rights can be acquired by acts of settlement as against an entryman claiming under a prior record entry, but as between subsequent claimants the prior actual settler is entitled to precedence upon the cancellation of the entry or extinguishment of the record title.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 11, 1905. (E. O. P.)

Counsel for Lem Morgan has filed, and the Department has considered, motion for review of its unreported decision of July 29, 1905, holding the homestead entry of Morgan for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 35, T. 11 N., R. 2 E., Oklahoma City land district, Oklahoma, subject to the rights of McNamara by virtue of his prior settlement on the land.

The question of law presented and relied upon as a basis for the pending motion, is set forth in the fourth specification of error, as follows:

The Hon. Secretary erred in virtually finding that the only question at issue was whether McNamara was the prior settler on said land, the real question at issue being whether McNamara's tenancy did not, under all the decisions, prevent him from setting up a settlement right upon the cancellation of said entry, and the Hon. Secretary erred in refusing and failing to pass on said question in any of his decisions, and contestee asks here specifically for findings of fact as to the tenancy of McNamara in order that if the Secretary denies this motion for review contestee may have a chance to present proper findings of fact, as sustained by the record, to a court of competent jurisdiction, in an action for resulting trust.

The facts necessary to a decision herein are, briefly stated, as follows:

The land involved was formerly embraced in an Indian allotment, and prior to the filing of Morgan's application was occupied by McNamara under an alleged lease from the Indian allottee, from whom he had purchased and owned the improvements thereon at the time of the cancellation of the said allotment, on January 8, 1903. Morgan's application was filed January 27, 1903, alleging settlement on the land the day previous. The testimony shows that the lease in question was made with a knowledge of the illegality of the allotment

and defective title of the lessor, and for the sole purpose of protecting McNamara's claim until opportunity was afforded him to exercise his settlement rights.

Counsel for Morgan asserts that the question now presented has never been directly passed upon in any of the prior decisions of the Department, yet the following language is found in the Department's decision now sought to be reviewed:

The question whether McNamara's right by virtue of being upon the land, with the intention of entering the same under the homestead law, attached *eo instanti* upon the cancellation of the Indian allottee's claim, was before the Department at the time its former decision was rendered, and was taken into careful consideration in arriving at the conclusion therein announced.

Decision is now specially asked upon this point in order that a resulting trust may be established in the courts in the event the same is adverse to the claim of Morgan.

The contention of counsel for Morgan can only rest upon the theory that the relation of McNamara*as tenant under his lease prevented the assertion of any settlement rights by him during the continuance of the lease and that the estoppel arising by virtue of this relation existed in so far as it effectually controlled the real intention of McNamara in connection with his alleged acts of settlement until actual knowledge of the termination of the lease had been brought home to him.

The Department has frequently held that settlement rights cannot be acquired by a tenant or an employe of another which can be set up to defeat the intervening rights of another. But the application of this rule is not general and cannot, nor has it been, adhered to in every case where the relation of landlord and tenant has been established. It is applied in those cases where the facts show that the tenant, agent, or employe, had never, at any time prior to the intervention of an adverse claim, manifested an intention to assert a settlement right in himself. The principle thus applied is correct but it should never be extended to cases wherein there was in fact a *bona fide* intention on the part of such settler to assert his rights at the first opportunity and he had assumed the relation of tenant simply to protect those rights and in furtherance of his honest purpose to assert them. (Clark v. Martin, 11 L. D., 72; Hall v. Levy, ib., 284.)

In the case of Withers v. Page (28 L. D., 547, 549), the reason of the rule requiring some overt acts of settlement is stated and a distinction is noticed between the cases where the principle heretofore referred to will govern and where it will not be applied.

The purpose of the rule requiring some overt act of settlement in addition to the purchase of improvements of a prior settler upon the tract of land is to give notice to the world of the settlement right and claim of the person so purchasing.

The same reason is equally controlling in the case of a lessee where the relation of landlord and tenant has terminated.

While no rights can be acquired by acts of settlement as against an entryman claiming under a prior record entry, yet as between subsequent claimants the prior actual settler is entitled to precedence upon the cancellation of the entry or extinguishment of the record title.

Counsel for Morgan vigorously contends that because McNamara had no actual knowledge of the cancellation of the record title of his lessor, the Indian allottee, until after the entry of Morgan, his acts of settlement and his intent were not contemporaneous and cannot be linked or connected to defeat such intervening entry. This proposition is asserted in the face of knowledge on the part of Morgan that McNamara was living on the land at the time he performed his alleged acts of settlement, and the Department is of the opinion the testimony supports the claim of McNamara that Morgan at that time had full knowledge of the circumstances under which he took the lease and of his fixed intention to make homestead entry of the land upon the extinguishment of the outstanding Indian title. The claim of Morgan is unsound in theory and unjust in principle and cannot be sustained. McNamara's intent had long been formed and his acts of settlement performed in accordance therewith and both were in existence and awaiting attachment as a settlement right *eo instanti* the right of the record claimant was destroyed. At that instant the relation of landlord and tenant ceased and the operation of the estoppel fell with it, and has no application either in controlling the rights or defeating the intention of McNamara.

The familiar doctrine of estoppel is an instrument for the prevention of fraud, and will never be applied to protect or promote it. As between landlord and tenant it arises from the obligation of the tenant to return the possession and it exists wherever this duty exists. The occupant in such cases is considered to have pledged his faith to return the possession of the land at the expiration of his term and during his tenancy the law will not permit him to deny or disparage his landlord's title. But when the obligation to return the possession is for any cause satisfied or becomes impossible by reason of the absolute failure of title of the lessor, the estoppel no longer exists. It falls with the extinguishment of the obligation. (See Washburn on Real Property, 5th ed., vol. 3, p. 98.)

Under the circumstances surrounding this case, the Department is of opinion McNamara was not estopped to set up settlement rights acquired prior to the cancellation of the Indian allotment and the termination of the lease, as against third parties.

With exceptions or limitations of this character it will be found on examination of the authorities, particularly those of modern date, that the doctrine of estoppel *in pais*, however it may have been applied formerly, cannot now

be asserted to preclude the grantee from denying his grantor's title and acquiring a superior one, unless there exists such a *relation of the parties to each other* as would render the proceeding a *breach of good faith and common honesty*. [Robertson *et al v. Pickrell et al.*, 109 U. S., 608, 616.]

Clearly the rights of McNamara under his settlement on the land were superior to those of Morgan, and he having asserted them within the required period they will be sustained, over the technical claim of settlement asserted by Morgan.

For the reasons herein stated the motion for review is denied.

MINING CLAIM—PLACER—LEGAL SUBDIVISIONS.

ROMAN PLACER MINING CLAIM.

Lands not embraced in the application for patent for a mining claim, and in the published and posted notice and other proceedings, can not be embraced in the entry.

The smallest legal subdivision of the public surveys provided for by the mining laws is a subdivision of ten acres, in square form; and such laws do not contemplate that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 16, 1905. (A. B. P.)

February 3, 1901, the Diamond Fire Brick Company made entry for the Roman placer mining claim, survey No. 14,524, Pueblo, Colorado. The claim, though located upon surveyed lands, does not conform to the United States public-land surveys, or to the system and rectangular subdivisions of such surveys. For this reason your office, by decision of July 8, 1903, directed that the company be required to conform the entry to the public surveys, on pain of the cancellation thereof in the event of default.

The company was notified accordingly, and, in response, filed what it terms an "amended application to purchase," wherein the claim is attempted to be described in tracts which, with two exceptions, contain only five acres each, though in rectangular form, as, for instance, the "S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$," and so on.

By decision of February 15, 1904, your office refused to accept the so-called amended application to purchase for the stated reasons, (1) that the lands are described in five-acre tracts, and not according to legal subdivisions, and (2) that, as so described, portions of the lands lie outside of the boundaries of the claims as located and entered. The company has appealed to the Department.

The claim as entered is without pretense to conformity with the

public surveys. Its shape is such, as finds no warrant whatever in the mining laws; and the refusal of your office to permit the entry to pass to patent was manifestly right. The chief contention of the company, in its endeavor to sustain the entry as it now stands, is that to have conformed the claim to the public surveys would have necessitated the inclusion of lands not placer in character. There is nothing in this contention. If it be assumed that the adjacent lands are not placer, as alleged, the laying of the lines of the location in conformity with the public surveys, which may be done to embrace tracts as small as ten acres in area, in square form, would not require the inclusion of adjacent non-placer lands to such extent as to affect the validity of the location for that reason. (Hogan and Idaho Placer Mining Claims, 34 L. D. 42.)

Your office was also right in refusing to accept the showing made by the company in its attempt to conform the claim to the public surveys. Lands not included in the application for patent, the published and posted notice and other proceedings, cannot be embraced in the entry. This is plain, and in view thereof, and of the fact as appears from the record that the claim cannot otherwise be conformed to the public surveys, it is clear that the defects therein are, for this reason, incurable.

Nor is there any authority under the mining laws for making entry and obtaining patent for a placer claim composed of tracts as small as five acres in area, though in rectangular form. The law on this subject is found in sections 2329 to 2331, inclusive, of the Revised Statutes, which sections are as follows:

Sec. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

Sec. 2331. Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but

where placer-claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

That under these sections placer claims located since May 10, 1872, whether upon surveyed or unsurveyed lands, are required to conform as nearly as practicable to the United States system of public-land surveys, is settled by numerous decisions of this Department. (Miller Placer Claim, 30 L. D., 225; Wood Placer Mining Company, 32 L. D., 198—on review, *Id.*, 363; Hogan and Idaho Placer Mining Claims, 34 L. D., 42; Rialto No. 2 Placer Mining Claim, 34 L. D., 44; Laughing Water Placer, 34 L. D., 56.)

There is no difficulty in applying the principle to a claim upon unsurveyed lands. It is done by locating the claim in rectangular form, of lawful dimensions, and with east-and-west and north-and-south boundary lines. (Rialto No. 2 Placer Mining Claim, 34 L. D., 44; Laughing Water Placer, 34 L. D., 56; Wood Placer Mining Company, 32 L. D., 363, 364-365.)

If the claim be upon surveyed lands, as is the case here, the matter of conforming the same to the public surveys, where not for some sufficient physical or other reason impracticable to do so, is accomplished simply by locating the claim according to the legal subdivisions of such surveys.

The smallest legal subdivision recognized by the public land laws, other than the placer mining laws, is a tract of forty acres—that is, a tract in square form constituting one fourth of a quarter section, or one sixteenth of a section, of land—except where by reason of a section being fractional its subdivision into smaller tracts may result in the formation of lots of irregular shape and dimensions, in which event such lots are considered legal subdivisions and are known and described with relation to the section by the numbers they respectively bear.

By the placer mining laws (Sec. 2330, *supra*) it is provided that “legal subdivisions of forty acres may be subdivided into ten-acre tracts;” and further, that “two or more persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof.” These provisions are intended to meet conditions, which not infrequently arise, peculiar to the assertion of placer claims, where the claimed placer deposits are limited in extent to tracts of much smaller area than forty acres. In such cases, it is provided: (1) that a regular subdivision of forty acres may be *subdivided*, that is, reduced by subdivision, according to the system of public land surveys, to four tracts of ten acres each in square form,

and (2) that in the event of contiguous claims of any size, though *less* than ten acres each, the persons, or associations of persons, asserting the same may make joint entry thereof.

Whether under the latter provision entry and patent may be obtained for a placer claim or claims aggregating less than ten acres is a question not now before the Department, and no opinion is expressed with respect thereto. It is sufficient for the decision of this case to say that the statute does not contemplate that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions of the public surveys. The smallest legal subdivision provided for by the statute is a subdivision of ten acres; and that must be in square form, else it would not be a subdivision according to the system of the public-land surveys.

The decision appealed from is accordingly affirmed.

As paragraphs 22, 23 and 24 of the mining regulations (31 L. D., 477-478) are not in entire accord with the views herein expressed, said paragraphs are hereby severally revoked and the following substituted in lieu thereof:

22. By section 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

23. In subdividing forty-acre legal subdivisions, the ten-acre tracts must be in square form, with lines at right angles with the lines of the public surveys; and the notice given of the application must be specific and accurate in description.

24. A ten-acre subdivision may be described, for instance, if situated in the extreme northeast of the section, as the "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of the section, or, in like manner, by appropriate terms, wherever situated; but in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

REPAYMENT—TIMBER AND STONE ENTRY—CHARACTER OF LAND.

HARRISON W. ORMANDY.

Where entry under the act of June 3, 1878, was erroneously allowed for land chiefly valuable for its mineral deposits and upon which mining claims had been located and improvements made prior to the timber land entry, but of which the entryman had no knowledge, and it appears that he acted in good faith and did not procure the entry through misrepresentation, repayment of the purchase money paid by him may be allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 16, 1905. (C. J. G.)

An appeal has been filed by Harrison W. Ormandy from the decision of your office of July 11, 1905, denying his application for repayment of the purchase money paid on timber and stone entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 7 S., R. 13 E., La Grande, Oregon. Said denial was for the reason that Ormandy filed with his timber land declaration a nonmineral affidavit, when in fact the land contained valuable mineral deposits, and thus procured his entry through misrepresentation.

Ormandy filed the usual sworn statement for the purchase of said land June 25, 1902, and after due notice was allowed to make entry therefor September 18, 1902, cash certificate being issued to him accordingly. Both his application to purchase and the non-mineral affidavit filed at the time of submitting proof contained the statement, in substance, that he had personally examined the land and found the same to be chiefly valuable for its timber; that there were not within its limits to his knowledge any minerals of value nor any mining or other improvements. The entry was contested by H. C. Thomas *et al.*, who alleged that the land embraced therein was mineral in character and that they were joint owners of mining claims located thereon prior to the date of said entry; that they were before and had been since said entry was made, in actual and continuous possession of said claims; that the testimony on which Ormandy was allowed to make entry, to the effect that the land was uninhabited, unappropriated and unimproved, was false and fraudulent; and that the possession, occupancy and improvements of H. C. Thomas *et al.* were at the time of Ormandy's application open and visible, and must have been well known to him and his witnesses if they ever inspected the premises. A hearing was prayed for and granted, but on the date named therefor Ormandy made default; he also made default at a postponed hearing. The contestants submitted testimony in support of their allegations as to the mineral character of the land and as to their locations and improvements; also a letter from Ormandy's attorneys, addressed to contestants' attorneys, as follows:

We note that you will withdraw the allegations of fraud. This letter may stand as a stipulation by us on behalf of Mr. Ormandy that the protest represented by you may be sustained and his own timber entry canceled; the basis of the cancellation being *prior mineral rights held by your clients*, it being stipulated and understood that the entry by Mr. Ormandy was made by him in good faith and without any knowledge that the land contained any mineral deposits.

A formal stipulation signed by the respective attorneys is also in the record and is as follows:

1. That the protestants withdraw their allegations of fraud from their protests herein. 2. That the allegations of the protest are true except as to the matter of fraud on the part of the protestee. 3. That the protestee, Harrison W. Ormandy, made the entry of the land covered by cash certificate No. 7522 in good faith and without any knowledge that the said land contained any mineral deposits or that the protestants had prior mineral rights. 4. That the protest herein may be sustained and the timber entry canceled. 5. That this stipulation shall apply to the protests of H. C. Thomas, H. W. Foster, and George E. Robinson *vs.* Harrison W. Ormandy, and H. C. Thomas and H. W. Foster *vs.* Harrison W. Ormandy; and the facts herein stipulated may be taken as true therein.

The local officers rendered decision finding that the statements made in the stipulation were corroborated by the testimony submitted at the hearing, and recommended cancellation of the timber land entry. Your office canceled said entry as follows:

On consideration of the evidence submitted I find that the same shows protestants to have been in possession of valid lode mining claims embracing portions of each of the forty-acre sub-divisions covered by cash entry No. 7522 at date of said entry, and accept the withdrawal by the timber claimant of his said entry. Contest No. 1856 is accordingly closed and timber cash entry 7522 canceled.

In an affidavit filed with his application for repayment, Ormandy says:

Before making my original entry, and as I remember in June, 1902, I personally went upon the land entered by me. I went over each forty acre tract thereof and followed out the lines. I also went over the land itself in different localities thereof. The land was mountainous and not agricultural; I saw no evidence of mineral thereon and saw no mining tunnels or anything to indicate mineral locations thereon; the land as it appeared to me was valuable only for timber and stone and I made entry thereof under the timber and stone act in perfect good faith and believing at the time that there was no mineral thereon.

Under date of August 15, 1904, I received information from the Honorable Register and Receiver of the United States Land Office at La Grande that a contest affidavit by H. C. Thomas *et al.*, against my entry had been made upon the ground that previous to the time of my entry such protestants had gone upon a portion of said land and had made mineral locations thereon. No entries had been made by said protestants in the United States Land Office and when I made my entry I had no knowledge of any such locations; and although I had been over the land as above stated and had complied with the requirements of the law and regulations regarding entries under the timber and stone act, I had never seen any evidence of any appropriation of any portion thereof for mining purposes. After such contest had been instituted evidence was submitted to my attorney showing that upon a portion of the land the protestants had recorded notices of mineral locations in the office of the Recorder of Conveyances of the County in Oregon in which the land in question was situated. Being advised by my attorney that if such were the facts my entry would be probably subject to cancellation, although it had been made by me in good faith, I executed a stipulation relinquishing my claim and consenting that the entry be canceled.

I live far from La Grande and am an employee of the Boston Rubber Shoe Company at Portland, Oregon, and I had neither time nor money to make any contest, nor did I desire to claim the property if any one before me had in good faith expended any money in making any mineral locations upon the property in question. I moreover consented to the cancellation of my entry upon the understanding that, my entry having been made in good faith, the government would repay me back the money which I paid it for the land in question.

One of the witnesses on behalf of Ormandy under his proof says in a sworn statement:

I myself knew the land before I testified as a witness, having been over the same, and I testified that in my belief said land was valuable chiefly for timber and stone and subject to entry under the provisions of the timber and stone act; such was my belief from observation thereof and the testimony was given in good faith and without any knowledge of any mineral locations having been made thereon.

It is well established, as stated by your office, that repayment will not be allowed to one who procures an entry of public land through misrepresentation. It is equally well settled that land chiefly valuable for its mineral deposits can not be taken under other than the mineral laws. The testimony on behalf of contestants at the hearing is to the effect that there were on the land at the time of Ormandy's timber land entry a cabin, sheds, tunnel house, blacksmith shop, open cuts and tunnels, the combined value of which was several thousands of dollars. If this testimony be true it seems somewhat incredible that Ormandy failed to see these improvements. However, it was not impossible, the land being apparently inspected merely with reference to its timber value, for him to pass over each legal subdivision thereof without seeing said improvements. The charge of bad faith was withdrawn, and neither the local officers nor your office, in passing upon the contest allegations, found that he had acted in bad faith, only deciding that the land was in fact mineral in character. In view of the testimony to this effect, as well as the stipulation to the effect that Ormandy made his entry in good faith, and also in face of the positive denial of Ormandy that he had any knowledge of the fact that the land contained mineral deposits, and a like denial by one of his proof witnesses, it may very properly be held that bad faith on his part has not been proven. This is the sole point upon which the case turns, for, as was said in the case of *Hayden v. Jamison* (on review, 26 L. D., 373), reference being made to the rule announced in the case of *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D., 233)—

It having been found, and not being now questioned, that the land in controversy is more valuable on account of its said stone deposit than for agriculture, this case comes squarely within the rule above set out, and it results that the homestead entry of Jamison as to the land in conflict was and is unauthorized and can not be upheld.

In this view, in the absence of proof of bad faith, it may properly be concluded that Ormandy's entry was canceled for conflict within the meaning of the repayment statute, after a hearing had and finding that the land was and is chiefly valuable for its mineral deposits. See in this connection cases of Joseph Hobart (12 L. D., 431); Nils N. Ydsti (27 L. D., 616); George D. Cloninger (28 L. D., 21).

The decision of your office herein is reversed, and repayment will be allowed as applied for, in the absence of other objection.

COAL LAND—APPLICATION TO PURCHASE.

LEHMER *v.* CARROLL ET AL.

It is not essential to the validity of an application by an association of four persons to purchase six hundred (or six hundred and forty) acres of coal lands that the applicants shall have opened and improved a mine or mines of coal on each of the tracts embraced in the application. It is sufficient in such case, where there are no conflicting claimants, that the applicants show that they are severally qualified to purchase, that the lands applied for are of the character subject to sale under the coal land laws, and that as an association of persons the applicants have expended not less than five thousand dollars in working and improving a mine or mines of coal on the lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 16, 1905. (A. B. P.)

October 10, 1903, Mary H. Carroll, Mariam Killom, Joseph Beadle and James Brady filed application to purchase, under the coal land laws (secs. 2347 to 2352, inclusive, of the Revised Statutes), the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of Sec. 19, T. 5 S., R. 23 E., and the E. $\frac{1}{2}$ of Sec. 24, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 5 S., R. 22 E., Bozeman, Montana, and made tender of payment at twenty dollars per acre. The application, itself under oath, was accompanied by the separate individual affidavits of the applicants and two other persons. In these papers it is set forth, in substance, that the lands applied for are of the class and character subject to sale under the coal land laws, that the applicants are severally qualified to purchase, and apply to purchase, as an association under section 2348, and that they have expended the sum of \$8,000 in developing and improving mines of coal on the lands.

With the application to purchase were presented what purport to be deeds of release and quitclaim to the associated applicants, embracing, severally, portions of the lands applied for, and for which the persons who executed the deeds had, respectively, previously filed coal declaratory statements, under section 2349. From the official records it appeared that other declaratory statements had been filed covering portions of the lands. The local officers thereupon notified

the coal declarants, as well as those from whom deeds of release and quitclaim had been obtained as those who did not appear to have released their claims, that they would be allowed until December 28, 1903, to show cause, if any they could, why the associated applicants should not be permitted to purchase and enter the lands applied for. None of the parties so notified ever appeared in the proceedings.

December 26, 1903, one Frank W. Lehmer, a stranger to the record, filed his sworn protest, corroborated by the affidavit of one H. H. Griffith, against the application to purchase. On this protest a hearing was had, at which the protestant submitted the testimony of one witness. The applicants introduced no evidence, but rested their case upon the proofs filed in support of their application to purchase and the cross-examination of the witness introduced by the protestant.

The local officers recommended that the protest be dismissed and that the application to purchase be allowed. On appeal by the protestant, your office affirmed the action below with the modification that the applicants be required to furnish certain additional proofs before entry. The protestant thereupon appealed to the Department.

In his protest Lehmer asserts no right, or claim of right, in himself to any of the lands embraced in the application to purchase. He does not deny that the lands are chiefly valuable for coal and in other respects subject to sale under the coal land laws. His charges are, in substance and effect, (1) that no preference right of entry was acquired by any of the parties from whom the applicants obtained deeds of release and quitclaim to themselves of the lands covered by the declaratory statements filed by said parties, respectively, because none of them ever opened and improved any coal mine or mines on the lands, wherefore the declaratory statements were illegal and of no effect, and consequently no rights were conveyed by such deeds, (2) that the applicants to purchase had not themselves, either collectively or individually, prior to the time of filing their application, or at any time, opened and improved any coal mine upon any of the lands applied for other than the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. 5 S., R. 23 E., and (3) that the applicants to purchase had not, either as an association or as individuals, expended the sum of \$5,000 in working and improving any mine or mines of coal on any of the lands applied for.

Under the facts disclosed by the record it is obvious that the first and second charges of the protest relate to immaterial matters, and raise no question for departmental inquiry. In the first place, upon failure of the coal declarants to appear and show cause against the application to purchase, after being notified to do so, they ceased to be parties to the record and were thereafter out of the case. This left the record clear of any claim to the lands other than that asserted by the associated applicants to purchase, and it could make no difference

to them, or to the government, whether the coal declaratory statements were valid when filed or not. In the second place, it is not essential to the validity of the application to purchase that the associated applicants should have opened and improved a mine or mines of coal on the several tracts of land applied for. In this particular, aside from the requirement involved in the third charge of the protest, it is sufficient that the proofs show the lands to be of the class and character subject to disposal under the coal land laws. (*McKibben v. Gable*, 34 L. D., 178.)

The third charge of the protest does present a matter material for the government to inquire into. The statute (sec. 2348) provides that when an association of not less than four qualified persons shall have expended not less than five thousand dollars in working and improving any mine or mines of coal on the public lands, such association may enter not exceeding six hundred and forty acres of such lands, including the mining improvements. As touching the quantity of lands applied for, the present application is based upon this provision of the statute. The protest charges that the expenditure in mining work and improvements required to authorize such a purchase had not been made. On this question, material only to the government, inasmuch as in his protest Lehmer asserts no claim to the lands or any part thereof, the testimony of the one witness introduced at the hearing not only does not overcome the showing made by the application and proofs but tends to sustain such showing. There is therefore nothing in this charge.

It is unnecessary to consider the many other matters discussed by counsel, and in the decision appealed from, for the reason that they have no material bearing on the case. The application to purchase and the proofs submitted therewith show substantially all that the law requires, and the Department sees no necessity for the additional proofs called for by your office. Upon failure of the prior record claimants, after notice, to appear and show cause against the application to purchase, there remained nothing in the way of the allowance of the application except the one and only material charge in Lehmer's protest. That charge being now disposed of the application should be allowed to pass to entry upon payment of the purchase price for the lands, unless other material objection shall appear; and the decision of your office is modified accordingly.

August 19, 1904, one B. W. Metheny offered for filing his application to purchase a portion of the lands in question, as coal lands, and submitted therewith his affidavit, corroborated by two witnesses, wherein the matters set forth in Lehmer's aforesaid protest are in substance repeated, with the further averment that the application by

Carroll and others was not made for their own use and benefit, "but indirectly, if not directly," for the use and benefit of one J. C. McCarthy. The local officers rejected the application because of the pending controversy upon the protest by Lehmer. Your office affirmed the rejection of the application, but, treating Metheny's affidavit as a new protest or contest against the application by Carroll and others, held that the same should be suspended to await the result of the controversy upon Lehmer's protest. Both parties have appealed here.

September 27, 1904, Lehmer offered for filing his own application to purchase a portion of the lands in question, as coal lands. With the application he submitted his affidavit, corroborated by two witnesses, wherein are set forth substantially the same matters contained in his protest aforesaid, with the additional averment, upon "information and belief," that Carroll and others did not apply to purchase the lands for their own use and benefit, but for the use and benefit of J. C. McCarthy. The local officers rejected the application, and their action was affirmed by your office. Lehmer has appealed here.

The action by the local officers was right in each case. In so far as the decisions of your office sustain their rulings, they are hereby severally affirmed. To the extent of the holding, however, that Metheny's affidavit of protest should await the result of Lehmer's protest, with the view to a further hearing upon substantially the same grounds, your decision in that case is reversed, and said affidavit is rejected. The charge in each of the affidavits, intended to raise the question of the good faith of the associated applicants, Carroll *et al.*, is not sufficiently clear and explicit to justify a further hearing, under the circumstances of this case.

SCHOOL GRANT-ADJUSTMENT-INDEMNITY SELECTION.

STATE OF CALIFORNIA.

In the adjustment of school land grants, it is within the power, and is the duty, of the land department to see that sufficient losses, or quantities of land to which the State might have been entitled under its grant had they been in place and not otherwise disposed of, equal in amount to previous certifications on account of the grant, approximately, are furnished as a base for such previous approvals or certifications, before other approvals and certifications are made on account of the grant.

There is nothing in the act of March 1, 1877, relating to indemnity school land selections in the State of California, in conflict with this requirement.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 17, 1905. (F. W. C.)

Your office letter of the 31st ultimo calls attention to certain conditions made apparent after an examination of the grant to the State

of California in aid of common schools, presenting a seeming excess of 50,176.76 acres in approvals or certifications heretofore made on account of said grant.

Following the disclosure of an excess, after examination of the grant at the instance of this Department, your office laid certain rules upon the State requiring that other and sufficient bases be supplied to meet the apparent excess in approvals. After a conference between your office and the State surveyor-general, that officer, under date of July 6, last, addressed a communication to you, being in the nature of a motion for review, in which is set up certain reasons why the State should not comply with the demands of your office in the particulars referred to. This communication accompanies your letter of the 31st ultimo. In your said letter you discuss at length the different questions sought to be raised by the surveyor-general of the State.

It is not the purpose of the Department at this time to assume direction of this matter further than to provide a fitting rule governing cases of this sort, disclosed upon partial or final adjustment of the State's grant in the State of California or elsewhere, and to consider the effect of the act of March 1, 1877 (19 Stat., 267), in so far as it may affect the matters presented.

The grant of lands to the several States for the support of common schools is generally based upon the unit of a township and it is the number of townships or fractional townships within the boundaries of the State that determines the extent or measure of the grant; hence, in adjusting the grant, the main object is to determine whether the State has received for each township the designated sections, an equal quantity of lands in lieu thereof, or for the fractional quantity due where such sections are wanting or the township is fractional in quantity. When this end is reached the grant is fully satisfied and the State fully indemnified.

In *Knight v. Land Association* (142 U. S., 161, 181), it was said:

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

In the orderly process of adjustment the several States are required to set forth in their indemnity lists the specified losses on account of which the indemnity is claimed, and it is the object of regulations issued governing such selections to make the losses and selected lands equal, as nearly as practicable, in area. Such designation of losses is for the information of this Department, to the end that the grant be not exceeded. Without determining at this time what will be considered as an excess in any given case—that is, how

much of a variance between the selected and the lost lands will be considered sufficient to form the basis for a demand for further designation of losses—it is sufficient to say that where it is made apparent from an examination that a real excess in approvals exists, it is not only within the power of this Department, but becomes its necessary duty, to see that sufficient losses or quantities to which the grant might have been entitled, had they been in place and not otherwise disposed of, equal in amount to previous certifications on account of this grant, approximately, are furnished as a base for such previous approvals or certifications, before other approvals and certifications are made on account of the grant.

A demand by your office in keeping with this rule of adjustment will stand and be respected until complied with on the part of the State, or until, in a proper proceeding before this Department, it is set aside.

From your office letter it appears that the greater part of the apparent excess arises on account of approvals or certifications made to the State prior to March 1, 1877, and on behalf of the State it is claimed, without questioning the excess, that if it existed it was fully settled and satisfied by the confirmatory provisions of the act of March 1, 1877, *supra*, and can not, for that reason, be made the basis for a demand for further specifications of losses in satisfaction of such previous approvals.

The provisions of this act were fully discussed in *Durand v. Martin* (120 U. S., 366), and while there is much said to support a claim that all previous certifications on account of the school grant to the State of California were confirmed by its provisions, it is made clear that it was not intended thereby to enlarge or make any new grant to the State, which would be the effect of a concurrence by this Department in the State's contention.

In said case the court said (pages 374-5):

The statute relates only to such selections as had been certified to the state, and, taken as a whole, it meets the requirements of all the cases of defective selection which could be so certified. These are: 1. Cases where the state was entitled to indemnity, but the selection was defective in form; 2. Cases where the original school sections were actually in place, and the state was not entitled to indemnity on their account; and 3. Cases where the state was not entitled to indemnity, because there never had been such a section sixteen or section thirty-six as was represented when the selection was made and the official certificate given. As to the first of these classes, the certificate was simply confirmed because the state was entitled to its indemnity, and nothing was needed to perfect the title but a waiver by the United States of all irregularities in the time and manner of the selections. As to the second, the selection was confirmed, and the United States took in lieu of the selected land that which the state would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the state. And as to the third, in lieu of confirmation, *bona fide* purchasers from the state were given the privilege of perfecting their titles by paying the United

States for the land at a specified price. Under these circumstances, it was a matter of no moment to the United States whether the original selection was invalid for one cause or another. If the state was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the state claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the state had claimed and sold land to which it had no right, and for which it could not give school land in return, and equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States.

It may be, as was claimed in argument, that when the bill was originally prepared the framer had it in mind only to provide for selections made in lieu of school sections within Mexican grants before the final survey of the grants, and for selections made in lieu of sections not finally included within the survey of a grant; but to our minds it is clear that before the bill finally became a law, Congress saw that, as ample provision had been made for the protection of the United States in all cases, it was best to include all certificates which were defective, no matter for what cause, and so the words "or are otherwise defective or invalid" were added in what seemed to be the most appropriate place to carry that purpose into effect. No selection was made good unless it had been certified, and not then unless the United States got an equivalent either in land or in money, or in carrying out their original school-land grant. In this way the titles of all *bona fide* purchasers from the state were or could be perfected without loss to the United States, and that, we have no doubt, was the intention of Congress when the statute was enacted.

It is not proposed to question approvals or certifications made many years ago on account of school grants whether before or after March 1, 1877. It is well understood that the State only makes selection of its school lands after having found a purchaser for the same. As before stated, the losses set forth in these lists as a base for the indemnity selections, are required primarily for the information of this Department as a check against exceeding the grant, and to require that further losses be supplied where, through mistake, the selections were permitted to exceed the losses, does not affect such previous approved selections, and to exact that losses be supplied to meet such excess before further approvals or certifications are made on account of the grant is the only reasonable course open to this Department in protecting the interests of the United States in the matter.

The matter of the further adjustment of this grant, and other school grants to the several States, in support of common schools, is therefore remanded to the primary consideration of your office. You will advise the State of California of the conclusions herein reached, and while the State should be afforded an opportunity to bring any matters arising in the adjustment to the attention of this Department, by petition or appeal, it is hoped that the whole matter may be speedily and satisfactorily adjusted.

HOMESTEAD ENTRY—ADDITIONAL—ACT OF APRIL 28, 1904.

CHARLES E. MYERS.

Where an application to make homestead entry was pending at the date of the act of April 28, 1904, and prior to allowance of entry thereon the applicant presented a supplemental application to enter additional lands under the provisions of said act, requesting that the two applications be considered together, the fact that entry on the original application was inadvertently allowed without considering the supplemental application, does not warrant rejection of the application for additional entry on the ground that the original entry was allowed subsequently to the passage of the act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 18, 1905. (C. J. G.)

A motion has been filed by Charles E. Myers for review of departmental decision of June 23, 1905 (not reported), sustaining the action of your office in rejecting his application to make homestead entry under the act of April 28, 1904 (33 Stat., 547), for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 23, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, T. 35 N., R. 25 W., Valentine, Nebraska.

The records of your office show that on December 21, 1903, Myers made homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 35, T. 35 N., R. 25 W., which he relinquished April 27, 1904, and on the same day applied to make second homestead entry for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 35, T. 35 N., R. 25 W. The application was forwarded to your office May 13, 1904.

On July 18, 1904, while his application of April 27, 1904, was pending in your office, Myers applied for the land first described herein, asking that he "be granted a homestead entry upon said land in connection with the land I have applied for on April 27, 1904, which application is now on file, and I ask that the same be made and considered herewith." The following indorsement, under date of August 9, 1904, was made on the back of said application by the local officers:

Charles E. Myers made application for a second homestead entry as stated in his affidavit and on July 18 filed the within as amendment to said homestead application, the land applied for now being vacant, and having recommended his application for a second entry on which the applicant is now residing we would recommend that his application be allowed for the land applied for originally and for the land applied for herein and all be treated as one application under the act of April 28, 1904.

This paper was received in your office August 15, 1904, and October 25, 1904, your office, after stating the reasons given by Myers for relinquishing his entry of December 21, 1903, allowed his application of April 27, 1904, and gave him sixty days from notice in which to make second entry for the land embraced in said application, no reference being made to his application of July 18, 1904, nor the recom-

mentation of the local officers. In accordance with these directions Myers, on November 29, 1904, completed his application of April 27, 1904, and made entry for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 35, T. 35 N., R. 25 W., accompanying the papers with the following sworn statement dated November 29, 1904:

Comes now the said Charles E. Myers, and, completing his entry said described land by payment fees and commissions therefor, on oath states that he is now and has been residing with his family on said land since about May 5, and commenced making improvements preparatory to establishment of such residence on April 28, 1904; that he does not elect to exhaust his homestead right by entry thereof but asks to be allowed to amend same so as to include the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 23, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, said Tp. 35 N., in accordance with an application heretofore filed by him, and the additional land applied for being the only land contiguous to his homestead as allowed which is subject to homestead entry and not embraced in application of any other person.

April 1, 1905, your office passed upon Myers's application of July 18, 1904, referring to the recommendation of the local officers thereon, and treating said application as one for additional entry under the act of April 28, 1904, *supra*, and concluded as follows:

The former application having been already considered by this office and the entry allowed of record, as above stated, the application does not come within the provisions of section 2 of the act of April 28, 1904, *supra*, for the reason that the original entry was made subsequent to the date of said act. The application is, therefore, hereby rejected, subject to the right of appeal.

Upon appeal, departmental decision of June 23, 1905, a review of which is now asked, was rendered, which followed and affirmed the foregoing action of your office without discussing or referring to Myers's application of July 18, 1904, or to his sworn statement of November 29, 1904.

Under the provisions of section 2 of the act of April 28, 1904, *supra*, known as the Kinkaid Act, and subject to its conditions, "entrymen under the homestead laws . . . who own and occupy the lands heretofore entered by them, may . . . enter other lands contiguous." This, however, is not the provision of the act which Myers in effect invoked. While, prior to said act he had applied to enter 160 acres, which was all that was allowable at the time, yet his application had not been acted upon at the passage of the act nor prior to the time he applied for the benefits of said act in connection with his former application. It was manifest error to thus ignore his application of July 18, 1904, as the applications which he asked to be considered together were both pending at the date your office acted upon his first application, and he was clearly entitled to the provisions of the act of April 28, 1904, which in the meantime had been passed, as the circular instructions issued under said act May 31, 1904 (32 L. D., 670), contains this paragraph:

Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and

applications therefor will be considered under the instructions of the respective laws under which they are made.

If, therefore, Myers was qualified to make entry of 160 acres under his application of April 27, 1904, as found, he was likewise entitled to the benefits of the act of April 28, 1904, said act having been passed before final action upon said application. It follows, too, that his rights in this respect are not prejudiced by the error in failing to consider and pass upon said rights, which were timely asserted by the filing of his second application of July 18, 1904.

The motion for review is therefore granted, departmental decision of June 23, 1905, is hereby vacated, the decision of your office of April 1, 1905, is reversed, and your office will allow Myers to amend his entry of November 29, 1904, in accordance with his application of July 18, 1904, so as to include in addition to the land embraced in said entry the land described in said application.

TOWNSITE ENTRY—MINERAL LAND—SECTION 16, ACT OF MARCH 3, 1891.

NOME AND SINOOK COMPANY ET AL. v. TOWNSITE OF NOME (ON REVIEW).

The owners of unpatented mining claims located upon the mineral lands of the United States are entitled to the exclusive and peaceable possession of their claims so long as they continue to comply with the requirements of the law respecting possessory rights, and are not required to apply for patent at any time, or ever, in order to preserve such possessory rights.

Locations upon the mineral lands of the United States, lawfully possessed and held under the mining laws at the date of a townsite entry embracing such locations, are within the meaning of the language of section 16 of the act of March 3, 1891, "any valid mining claim or possession held under existing law," and can not be injuriously affected by the allowance of such entry; and the mineral claimant may, upon proper proceedings and proofs as in other cases, obtain patent for his claim notwithstanding the townsite entry or the issuance of patent thereon.

In the administration of the public land laws the land department has no authority to determine on their behalf alleged rights of claimants thereunder except where such claimants seek to obtain the legal or paramount title to the lands claimed; and where a claimant seeks to obtain the legal title to a tract of public land the inquiry by the land department is directed to questions affecting his right to have such legal title conveyed to him and not to questions relating to possessory or other rights unrelated to and disconnected with his application for the legal title.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 24, 1905.* (S. V. P.)

This is a motion by the Nome and Sinook Company and R. T. Lyng for review of departmental decision of August 25, 1905, in the case of

Nome and Sinook Company *et al. v. Townsite of Nome* (34 L. D., 102). The case arose upon certain protests by said company, Lyng, and others, filed July 2, 1904, against the application of Porter J. Coston, trustee, to make townsite entry to embrace the incorporated town of Nome, Alaska. Entry was allowed upon the application August 5, 1904, at Juneau, Alaska, after the dismissal of the protests by the local officers.

The protests allege, amongst other things, the mineral character of the lands involved in the townsite application, and that protestants are the owners and in possession of valid placer mining claims embracing certain of such mineral lands.

In the decision complained of the Department held, in substance and effect, (1) that section sixteen of the act of March 3, 1891 (26 Stat., 1095, 1101), applies to placer mining claims, as well as to vein or lode claims as previously held (*Hulings v. Ward Townsite*, 29 L. D. 21), (2) that under the provisions of said section the protestants are fully protected in whatever rights they have acquired under the mining laws, as against claimants under the townsite entry, or patent when issued, and (3) that in the absence of applications for patent by the protestants the Department is without authority to determine any question relating to their rights as against the townsite claimants.

The contentions urged in the motion for review relate chiefly to the last two points of the Department's decision. They are in substance set forth in the following extracts from the motion for review:

Theoretically the issuance of the townsite patent would not affect the rights of these mineral claimants, but in fact, as the Department well knows, such a proceeding would be very disastrous to the mineral claimant in ninety-nine out of every hundred cases. The Department's proposition that it is under no obligation to order a hearing until these mineral claimants apply for patent, is not tenable, because, under the law, mineral claimants are not compelled to apply for a patent at any time, or ever. So long as the mineral claimant complies with the law annually he is entitled to the undisturbed and peaceable possession of and the right to work his property. This right, which is statutory and cannot be altered or amended or revoked by executive action, will be completely negated if departmental decision of August 29, 1905, is permitted to stand. . . .

These mineral claimants have, under the statute, the right to the undisturbed, peaceable possession of the claims they have located and worked, so long as they continue annually to comply with the requirements of the law; and for the Department to assume an attitude that will force them to apply for mineral patents, or else lose possession of at least a material part of their property, is to deny them a statutory right. Having complied with the provisions of the statute, of which there has been no denial by the townsite trustee in his application, and having made their locations upon mineral land, of which there has been no denial by the townsite trustee, these protestants are at liberty to make their application for mineral patent whenever they please, or never to make it; and, in the event they choose never to make application for patent, still

they have just as much right to the full and undisturbed enjoyment of their claims as though they were patented. Any decision to the contrary is in the face of the statute; and we respectfully submit that the decision complained of is of such character.

It is undoubtedly true that owners of unpatented mining claims located upon the mineral lands of the United States are entitled to the exclusive and peaceable possession of their claims so long as they continue to comply with the requirements of the law respecting possessory rights, and are not required to apply for patent at any time, or ever, in order to preserve such possessory rights. These propositions are clearly embodied in the mining laws and are well established by judicial authority. Whenever occasion has arisen, they have been recognized by the Department.

It does not follow, however, that the possessory rights of these protestants, if any they have acquired under their mining locations, have been or will be defeated or in anywise interfered with by anything contained in the decision complained of. On the contrary, it is expressly held in that decision that under the provisions of section sixteen of the act of 1891 no title can or will pass by the townsite entry or patent to "any valid mining claim or possession held under existing law." If, therefore, the claims of these protestants are upon mineral lands, and were lawfully possessed and held under the mining laws at the date of the townsite entry, they are clearly within the meaning of the language "any valid mining claim or possession held under existing law," and cannot be injuriously affected by the application of the principles enunciated in the Department's decision. And it was because of these principles that it was further held in that decision that patents might be obtained by the protestants for their claims, should they at any time in the future so desire, upon proper proceedings and proofs as in other cases, notwithstanding the townsite entry, or the issuance of patent thereon.

The further contention that in refusing to order a hearing on behalf of these protestants the Department has assumed an "attitude that will force them to apply for mineral patents, or else lose possession of at least a material part of their property," is equally untenable. In the administration of the public land laws the land department has no authority to determine on their behalf alleged rights of claimants thereunder except where such claimants seek to obtain the legal or paramount title to the lands claimed. And where a claimant seeks to obtain the legal title to a tract of public land the inquiry by the land department is directed to questions affecting his right to have such legal title conveyed to him and not to questions relating to possessory or other rights unrelated to and disconnected with his application for the legal title. When the protestants here shall apply for patents for their mining claims, should they ever do so, it

will be the duty of the land department to inquire into and determine any and all questions which may arise under the mining laws generally, or under section sixteen of the act of 1891, touching their rights to patents from the government for the legal title to the lands embraced in their claims. In the absence of patent applications the land department has no jurisdiction or authority to make such inquiry and determination. This is in substance the holding of the decision complained of, and the holding is clearly right.

The protestants may, if they choose, apply for patent and have all questions touching their right to the legal title to the lands claimed by them inquired into and determined in the manner stated, or they may continue to rest upon their claimed possessory rights under their locations, in which latter event, should their rights be invaded, their remedy will be in the courts where such matters are clearly cognizable.

It is objected in the motion for review that certain statements of fact contained in the Department's decision, assuming that they were considered material, are unjust to the protestants. The statements are as follows:

The town now has a population of about 5,000 during the open season, and about 3,000 throughout the year. The value of the improvements is now about \$800,000. The streets are graded, the business streets being planked; there are sidewalks and graded alleys; there is a fine water system, an electric-light plant, a telephone system, and a fully equipped fire department. The mining claims, for the most part, were located in January, 1899, and have not been systematically worked since that time.

This recital of the conditions as they appeared from the record was wholly unnecessary to the conclusion reached in the decision, and was not intended to, and cannot in any manner, affect the rights of the protestants, or of any other mineral claimants, in the assertion of their claims, either in the courts or before the land department. The recital is not to be considered as a finding of facts, and the decision will be treated as though such recital had not been made. Aside from this inadvertence, now rendered harmless, there is no error in the Department's decision, and the motion for review is accordingly denied.

DESERT-LAND ENTRY—ANNUAL EXPENDITURE—PERMANENT
IMPROVEMENT.

RIGDON *v.* ADAMS.

The mere purchase by a desert-land entryman of well casing alleged to be with a view to constructing an artesian well on the land embraced in his entry, but which was never used for such purpose, nor even removed to the land, but was paid for by note and left in the warehouse of the merchant from whom it was purchased, does not constitute a "permanent improvement" within the meaning of the desert land act, and the value thereof can not be applied toward meeting the requirements of the law relating to annual expenditure.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 28, 1905.* (J. L. McC.)

John L. Adams, on October 30, 1902, made desert-land entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 7, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 18 S., R. 26 E., Roswell land district, New Mexico.

He made his first yearly proof November 2, 1903, stating that he had expended the sum of \$173.60 in the "purchase of casing for an artesian well."

On April 5, 1904, James C. Rigdon filed contest against said entry, alleging that the entryman had "never placed the improvements required by law on the said desert-land entry," nor "expended the required amount of one dollar per acre in irrigating, reclaiming, cultivating and improving the same."

A hearing was had, as the result of which the local officers found and held that the charge had not been proved. The contestant appealed. Your office, on April 25, 1905, reversed the action of the local officers, and held the entry for cancellation. The entryman has appealed to the Department.

The defendant testifies that he, on October 26, 1903 (within one year after date of his entry), purchased "casing," such as is used in connection with artesian wells, from a firm in Roswell, New Mexico, but that, up to the date of initiation of contest (seventeen months after entry) he had not used it, nor even brought it to the land, but that it was still in the care of the firm from which he had purchased it; and that, aside from the purchase of said casing, he had done nothing in the way of irrigating, reclaiming, or cultivating said land.

The appeal contends that your office erred "in not giving Adams credit for the second year's expenditure of more than \$160, same having been performed on grubbing, clearing, making two miles of ditches, one mile of wire fence, and plowing nineteen acres."

According to the defendant's testimony at the hearing, nothing of all this had been done at the date of the initiation of the contest, hence it can not be considered as having cured his laches.

The appeal contends that there was "error in ruling that the only annual expenditure contemplated by the desert-land laws are in the construction of canals and ditches, and in permanent improvements upon the land." The argument in support of the appeal insists that said ruling "is the very acme of technicality, and does not agree with the Department's long line of decisions adjudicating . . . cases upon equitable principles, and mainly upon the question whether or not the entryman was proceeding in good faith."

Section 5 of the desert-land act, as amended by the act of March 3,

1891 (26 Stat., 1095), provides by what means such land shall be reclaimed, to wit:

By means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water-rights for the irrigation of the same.

It further provides that, within one year after entry:

The party so entering shall expend not less than one dollar per acre *for the purposes aforesaid*.

The annual proof should show an expenditure whereby the land itself is "permanently improved." It is exceedingly doubtful whether in any case an iron or steel (or other kind of) casing, mere portable property, unattached to any particular tract of land, disconnected therewith except by having been unloaded thereon, and as easily carried away as it was brought, could be considered as a "permanent improvement." In the case here under consideration, said casing was not even taken to the land, but remained in the warehouse where it was purchased—payment therefor having been made by defendant's note.

Not infrequently it requires well-casing to the value of a thousand dollars to encase an artesian well. If the defendant could satisfy the demands of the desert-land law as to improvement, irrigation, and reclamation, during the first year, by purchasing, or giving his note for, a few lengths of well-casing, why might he not as properly make his second and third years' annual proof in the same manner—leaving the casing in the care of the merchant from whom he purchased it, to be delivered at some time in the future, when demanded (if ever)? At the end of four years he could relinquish his claim for a valuable consideration, sell the casing for what it cost him—or omit paying the notes he had given therefor—and thus defeat the very purpose of the desert-land act, which contemplates that at the end of four years the land shall be reclaimed and in a state of cultivation. The Department can not convince itself that it would be proper for it to open so inviting a door to speculation and fraud.

The action of your office in rejecting said annual proof and canceling the entry was correct, and is hereby affirmed.

MINING CLAIM—APPLICATION FOR PATENT—PUBLICATION OF NOTICE—NEWSPAPER PUBLISHED NEAREST CLAIM.

PIKE'S PEAK AND OTHER LODES.

By the newspaper published nearest a mining claim, within the contemplation of section 2325, Revised Statutes, is meant the newspaper of established character and general circulation in the vicinity of the claim which is nearest in point of practicable accessibility; that is, nearest by the distance from the claim involved over the most nearly direct traversable

route, and over which the editions of the paper are or may be transported by the usual and available means of conveyance. The distance in contemplation is that which must actually be traveled to bring the paper into the neighborhood of the claim, in order that the intended office of the notice may in that vicinity be performed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 28, 1905. (F. H. B.)

January 25, 1904, The Pike's Peak Gold and Copper Mining Company filed application (No. 653) for patent to the Pike's Peak and certain other lode mining claims, Prescott, Arizona, land district; and the "Phoenix Republican," published at Phoenix, Arizona, was designated by the register as the newspaper in which notice of the application should be published.

February 8, 1904, Eli S. Perkins filed protest, alleging the current publication of the notice in the designated newspaper at Phoenix, distant, as further alleged, at least forty miles from the claims in an air line and probably fifty miles by the usually traveled route; that for a long time prior to the date of the patent application protestant has published the "News-Herald," a newspaper of established character and general circulation in the vicinity of the claims and elsewhere, at Martinez, about twenty-eight miles in a direct line and by the usually traveled route from the claims in question; and that the News-Herald is nearest the claims and is the newspaper in which the notice should have been published. Wherefore, protestant prayed that a hearing be ordered, to the end that he might furnish evidence to sustain the allegations of his protest.

Hearing was accordingly ordered and had, at which appearance was made and testimony submitted by and on behalf of both parties. March 29, 1904, the local officers, finding from the evidence little difference as to distance of the two papers from the claims, the Phoenix Republican to be a *bona fide* newspaper of established character and general and the greater circulation, held that greater publicity had been given the notice by its publication in the latter paper and that the register had not abused his discretion in the premises. Protestant thereupon appealed to your office.

In the course of its decision of September 19, 1904, your office, having examined the evidence, found therefrom, in substance and effect, that, geographically measured, Martinez is the nearer of the two towns to the claims in question, by from three to six miles, depending upon the particular points of each from which measurements are taken; that there are no direct routes of travel between Martinez and the claims, to reach either of which from the other a circuitous route must be followed; that from Phoenix to the claims the route of travel is comparatively direct, and, as far as accessibility is concerned, the

latter town is nearer than Martinez; that practically all business relations on behalf of these and other claims in the vicinity are with Phoenix, the place of the Pike's Peak company's offices and the post-office address of most residents of the mining district in which the claims in question are situate; that it does not appear that either newspaper has any considerable circulation in the immediate vicinity of the claims involved, few persons probably being resident there; that both may be called newspapers of general circulation, having subscribers in most of the towns in that section; that both appear to be established newspapers, and there is little choice between them in this respect; and that, whilst it would appear that a notice published in the Phoenix Republican would be most likely to attract the attention of persons having interests in the region of the claims involved, it is also true that the News-Herald is such a newspaper as is contemplated by the statute and mining regulations and is published actually nearer the land embraced in the application for patent. Wherefore, citing the cases of Tough Nut and Other Lode Claims (32 L. D., 359) and Northern Pacific Railway Company (*Ibid.*, 611), it was held that the designation of the Phoenix Republican was erroneous, the conclusion in that behalf reached by the local officers in the present controversy was reversed, and it was directed that the register designate another newspaper, for republication of the notice, falling within the intendment of the statute and the official regulations.

The applicant company has appealed to the Department. Several assignments of error are set out, those of which it is essential to consider being, in substance, that your office erred in observing geographical or direct-line measurements, instead of usually traveled routes, as governing in the selection of a newspaper; that it erred in holding that in designating the Phoenix Republican in this case the register abused his discretion; and erred in deciding the case upon authority of the two cases cited, *supra*.

First considering the evidence submitted in the case it may be said that the findings of the local officers and your office are sustained by it. It also appears, by undisputed testimony, that by the available routes of travel between the mining claims and the respective towns the distance to Phoenix is actually less. The general circulation of the Phoenix Republican is shown to be considerably greater than that of the News-Herald, of Martinez, and it was expressly admitted that the former is and was a newspaper "of established character and general circulation in the vicinity of the claims in question in Yavapai and Maricopa counties."

Upon the whole the Department is unable to agree with the conclusion reached by your office, and is constrained to hold that the appellant company's assignments of error, as above, are well founded.

The facts here disclosed are not parallel to those of either case cited by your office, and this case is not controlled by either of them, as will readily appear.

In the first case so cited—Tough Nut and Other Lode Claims—it was held that the register of the Prescott, Arizona, land office had abused his judicial discretion in the designation of the newspaper in which the publication in that case occurred, for the reason, as the facts were found, that two other *bona fide* newspapers of established character and general circulation in the vicinity of the claims involved were published at a point “at least six miles nearer,” the claims, “either by an air line or by the usually traveled route.” There appeared in that case to be no justification for the designation of the more remote paper in which the notice was published; and the record strongly suggested that the register’s judgment in that behalf had been influenced by the receiver’s ownership of that paper.

In the case of Northern Pacific Railway Company, the second case cited by your office, notice (pursuant to section 2335, Revised Statutes) of a hearing ordered to determine the character of certain lands, theretofore classified as mineral by the commissioners appointed under the act of February 26, 1895 (28 Stat., 683), was published in a newspaper many miles more remote from the lands than certain other existing and *bona fide* papers, in which, too, notices of the prior classification had appeared. The latter papers were respectively about twelve and eighteen miles nearer than the paper in which publication occurred, and the requirement of the statute had plainly not there been met.

Notice of each application for patent to a mining claim is required by the statute (Sec. 2325, R. S.) to be published, at the instance of the register, “in a newspaper to be by him designated as published nearest to such claim.” As has frequently been said, that officer is thus invested with discretion in the matter, but a judicial discretion which may be reviewed and controlled by your office and the Department to prevent its abuse. That discretion, within prescribed limits, is thus given him with the manifest object of carrying into effect the purpose of the statute itself. As said in departmental instructions of February 3, 1898 (26 L. D., 145, 146-7):

The statute clearly seems to indicate that the register is given some discretion in the selection of the newspaper. It may sometimes happen, as in the case of *Bretell v. Swift*, that the newspaper nearest the land, geographically measured, is not the paper nearest to the land by the usually traveled route, and is not the paper best calculated to secure publicity of the notice in the neighborhood of the claim. The statute is not simply that the publication shall be in a newspaper “published nearest to such claim,” but is that the publication shall be “in a newspaper to be by him [the register] designated as published nearest to such claim.” There are three elements in this requirement: First, the publication shall be in a newspaper; second, that newspaper shall be the one “pub-

lished nearest to such claim;" and third, the register shall designate and determine what newspaper is "published nearest to such claim." As applied to newspapers, printing is not the sole act of publication. To be published within the meaning of this statute, a newspaper must be circulated, that is, it must be distributed as a means of disseminating news. The performance of the register's duty, under the statute, requires the exercise by him of reasonable judgment and discretion, both in determining what is a newspaper and in determining which of several papers is the one published nearest to the claim. He should not act arbitrarily or indifferently in the matter, but should be guided by the purpose of the statute in requiring publication, which is the diffusion of information and notice respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof.

In the course of those instructions the Department reaffirmed the views expressed in the case of *Condon et al. v. Mammoth Mining Co.* (on review, 15 L. D., 330, 334), in which, discussing the provision of the statute in question, it was held—

that this means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interests and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, its stability and general circulation and the like. But it is a legal discretion and in its exercise his act is certainly subject to review and control by your office and the Department, and where it is shown that he has abused such discretion, your office, as well as the Department, has the power to set aside his action in order to avoid injustice or unfair discrimination, or an ignoring of the provisions of the law and the rules and regulations of the Department.

The Department does not entertain the view that geographical or air-line measurements should be applied in determining, for the purpose of the statutory notice, which of two or more newspapers published at different points is nearest the mining claim concerned. Under such an inflexible rule the register would have little room for the exercise of judgment and discretion in the determination of that question to the end that the statutory purpose might be best subserved. The circular of April 21, 1885, it is true, established a hard and fast rule in that respect, afterward incorporated into paragraph 37 of the mining regulations approved December 10, 1891, whereby it was declared that the register had "no discretion under the law to designate any other than the newspaper . . . of general circulation that is published nearest the land, geographically measured." But this construction was discarded in the ensuing revision of the regula-

tions, December 15, 1897, and supplanted by the provisions of paragraph 52 thereof (25 L. D., 561, 578), retained in the like-numbered paragraph of the regulations of June 24, 1899 (28 L. D., 594, 603), and in paragraph 47 of the present regulations (31 L. D., 474, 482), as follows:

The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

The omission, from the revision following the regulations of 1891, of the words "geographically measured," and the judgment and discretion to be employed by the register in determining in each case the proper newspaper, within the intent and meaning of the statute, for publication of notice, are subjects of remark and discussion in the departmental instructions of February 3, 1898, *supra*.

By the newspaper published nearest a mining claim, within the contemplation of the statute, is meant, as the Department regards it, the nearest in point of practicable accessibility; that is, nearest by the distance from the claim involved over the most nearly direct traversable route, and over which the editions of the paper are or may be transported by the usual and available means of conveyance. An objective, distant five miles in a straight line but distant ten miles by the only available route, is for practical purposes the greater distance removed. The purpose of the statute demands its practical application, and the distance in contemplation is that which must actually be traveled to bring the paper into the neighborhood of the claim, in order that the intended office of the notice may in that vicinity be performed. The use of the expression "usually traveled route," in this connection, however, may be misleading, inasmuch as the route "usually" traveled in a particular locality might not be the shortest of the available and traversable routes, within the intendment of the statute.

The register, in the exercise of the judgment and discretion lodged in him, must determine in every instance what is a newspaper, that is, whether of established character and general circulation, where it is actually published, its circulation in the vicinity of the mining claim involved and as compared with the like circulation of other papers of equal standing in other respects, and which among all of them is published nearest the claim according to the distance necessary to be covered by each to reach the neighborhood of the latter—all within the intent and meaning of the statute and to promote to the utmost its object, "which is the diffusion of information and notice respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof."

The facts here being found to be that the Phoenix Republican, designated for publication of notice of the Pike's Peak patent application, is a newspaper of established character, of equal circulation in the vicinity of the claims with the News-Herald of Martinez and of greater general circulation, and that the place of publication of the former is really nearer those claims than is that of the latter paper by the respective available routes of travel, it can not be held that the register abused his discretion in the premises or that the requirements of the statute have not been satisfied.

For these reasons the decision of your office must be, and it is, reversed.

TOWNSITE TRUSTEE—EXPENSES—SECTION 11, ACT OF MARCH 3, 1891.

INSTRUCTIONS.

Under section 11 of the act of March 3, 1891, attorney's fees may be properly included in the account of a townsite trustee, as legitimate expenses incident to the execution of his trust, and allowed by the land department, where necessary and not in excess of a just and reasonable amount.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) November 29, 1905. (C. J. G.)

The Department is in receipt of your office letter of November 17, 1905, submitting the correspondence of Porter J. Coston, trustee of the townsite of Nome, Alaska, and in that connection asking for instructions relative to the question of including certain attorney's fees in his account as such trustee.

The appointment of said townsite trustee was made under section 11 of the act of March 3, 1891 (26 Stat., 1095, 1099), which also authorizes the Secretary of the Interior to "provide by regulation for the proper execution of the trust." The fund from which are derived the expenses incident to the execution of his trust by the trustee, is created by levying assessments upon the townsite property. The regulations of August 1, 1904 (33 L. D., 163), under said act, after specifically naming certain purposes for which assessments may be made by the trustee, further prescribes:

and all other legitimate expenses incident to the expeditious execution of his trust.

Thus expenditures in connection with the legitimate work of the townsite trustee are not dependent upon prior legislative authority, as no appropriation is made by Congress for the purpose, and the money does not come out of the United States treasury. Hence the assessment fund is wholly under the control of the land department and it is purely discretionary with said department as to how and for

what purposes in connection with townsite work said fund shall be expended. It is believed that attorney's fees constitute a proper charge in certain cases upon said fund, and the circumstances set forth in the correspondence submitted seem to be sufficiently exceptional to warrant the inclusion of said fees in the "legitimate expenses" incident to the work of the trustee. It is not intended, however, by this paper to approve the fees in question, whatever they may be, the account for which has not yet been presented, but only to express the opinion that they may properly be allowed in the event they are found to be necessary and not in excess of a just and reasonable sum. In this connection it may be said that the trustee should exercise special care and judgment in the premises and be reasonably convinced of their necessity before incurring expenses of this character, as the levying of assessments in the first instance is and should be limited to matters necessarily attendant upon the proper execution of his trust.

RIGHT OF WAY—TELEPHONE AND TELEGRAPH LINES—SECTION 3, ACT OF MARCH 3, 1901.

OPINION.

The annual tax upon telephone and telegraph lines referred to in section 3 of the act of March 3, 1901, is conditioned upon two things: (1) The line upon which the tax is sought to be imposed must be upon lands such as the Secretary of the Interior is authorized to subject to the terms of the act, and (2) the line must not be subject to State or Territorial taxation. Where the line upon which the tax is sought to be imposed runs through any of the lands which the Secretary is authorized to subject to the terms of the act, and is not subject to State or Territorial taxation, such line is under the act subject to an annual tax not exceeding five dollars for each ten miles thereof constructed and maintained, regardless of any tax which may be levied and collected by a municipality through which the line runs.

Rights of way under the provisions of section 3 of the act of March 3, 1901, are "in the nature of an easement," and are property rights subject to sale or transfer without the consent of the Secretary of the Interior.

The term "line," as employed in section 3 of the act of March 3, 1901, means the right of way granted, and each separate line of poles is held to constitute an independent line, upon which the grantee may place as many wires as he chooses, the tax to be assessed against the property only at the rate of five dollars for each ten miles of line. In towns, where no well-defined system of parallel wires is maintained, each wire will be regarded as covering a separate right of way, and, if otherwise within the terms of the act, is subject to taxation as such.

The act of March 3, 1901, specifically provides that telephone and telegraph lines constructed under its provisions shall be operated and maintained under rules and regulations to be prescribed by the Secretary of the Interior, which carries with it the power to require sworn statements from the person, company, or corporation operating the lines, to the end that the annual tax be properly assessed and collected; but in the event of non-

compliance with such requirement, it is not within the power of the Secretary, under executive authority, to close the places of business of the offending parties, any question as to the forfeiture of the right of way being a matter for determination by the courts.

Assistant Attorney-General Campbell to the Secretary of the Interior,
October 27, 1905. (G. B. G.)

By reference of the Acting Secretary my opinion is asked as to certain legal questions arising in course of administration of the act of March 3, 1901 (31 Stat., 1058, 1083), and especially section 3 of that act, which is in full as follows:

That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Specifically, my opinion is desired upon the following questions:

First. Does the "annual tax" referred to in the statute apply to local exchanges within towns, or is it confined to long distance and toll lines?

Second. Does the law contemplate and require that transfers and sales of telephone lines shall be approved by the Department?

Third. Does the term "line," where it occurs in the statute providing for an annual tax "not exceeding five dollars for each ten miles of line," refer collectively to all the wires which the company may establish upon its right of way, or does it refer to each individual wire, particularly in towns where no well-defined system of parallel wires is maintained?

Fourth. Does this act authorize the Secretary of the Interior to prescribe regulations requiring owners of lines to furnish affidavit disclosing such information as may be necessary in order to facilitate the assessment of damages and the levy of taxes, and may the Secretary of the Interior, in the event of non-compliance with such regulations or with the law, close the places of business of offending parties?

Fifth. Will the making of a false affidavit in such cases be subject to prosecution in the Indian Territory?

Responding to this reference categorically, I am of opinion:

First. The annual tax referred to in the statute is conditioned upon two things: (1) The line upon which the tax is sought to be imposed must be upon lands such as the Secretary of the Interior is authorized to subject to the terms of the act, and (2) the line must not be subject to State or Territorial taxation. If, therefore, the line upon which the tax is sought to be imposed runs "through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation," and is not subject to State or Territorial taxation, such line is subject to an annual tax not exceeding five dollars for each ten miles thereof, constructed and maintained. It is not material to this question that the municipality in which such line is found may levy and collect a tax thereon; it is nevertheless subject to the special tax imposed by the act, unless subject to Territorial taxation.

Second. Inasmuch as the right of way granted by the Secretary of the Interior under said act is "in the nature of an easement," it seems clear that the right granted is higher than a personal privilege, and it being a property right is subject to sale or transfer without the consent of this Department.

Third. I am of opinion that the term "line," as employed in said act, means the right of way granted; that the grantee may place as many wires on this line as may seem desirable, and that a tax may be assessed against the property only at the rate of five dollars for each ten miles of line. In towns where no well-defined system of parallel

lines is maintained, it would seem that each wire covers an independent and separate right of way, and if otherwise within the terms of the act would be subject to taxation as such. Each independent line of poles is manifestly an independent line.

Fourth. The act specifically provides that these lines shall be operated and maintained under rules and regulations to be prescribed by the Secretary of the Interior, and I think you may, and that it is your duty to, prescribe such regulations as will secure an orderly administration of the act. This would carry with it the power to require sworn statements from the person, company, or corporation operating these lines, to the end that the annual tax might be properly assessed and collected. I do not think, however, that in the event of non-compliance with these regulations it would be within the power of the Secretary of the Interior to close places of business under executive authority. Whatever might be said of the power of Congress to confer upon an executive officer such judicial functions as would be necessary to terminate the right granted, no attempt is here made to confer such power on the Secretary of the Interior, and it is clear that any question as to the forfeiture of such right of way would only be cognizable in the courts. I am of the opinion, however, that it would be the duty of the Secretary of the Interior in a proper case to refer the matter to the Department of Justice for such proceedings as seemed proper and necessary in the discharge of the duties imposed upon him by the act.

Fifth. The question as to whether a prosecution for making a false oath in these matters would be cognizable in the courts of the Territory has not arisen, and may never arise. I therefore beg to be excused from answering that question at this time.

Approved:

E. A. HITCHCOCK, *Secretary.*

SOLDIERS' ADDITIONAL HOMESTEAD—SERVICE—SECTION 2304, R. S.

HERBERT C. JOHNSON.

In computing the period of service of a soldier "who has served in the army of the United States," within the meaning of that phrase as used in section 2304 of the Revised Statutes, the entrance of the soldier into the army will be considered as dating from his muster into the service, and not from his enrollment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 6, 1905. (E. O. P.)

Herbert C. Johnson, assignee of Philander L. Compton, has filed, and the Department has considered, motion for review of its unreported decision of December 14, 1903, denying his application to

enter, under the provisions of section 2306 of the Revised Statutes, lots 2 and 3, Sec. 1, T. 34 N., R. 110 W., Evanston land district, Wyoming, said application being based upon Compton's service in the army of the United States during the war of the rebellion, and his prior homestead entry made October 1, 1872, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, T. 21 N., R. 10 W., Traverse City land district, Michigan.

But two questions are presented by the pending motion. It is contended by counsel that the Department erred in computing the time of service in the army of the United States from the date of muster-in rather than from the date of enrollment of the soldier; and that even if such interpretation of the language of section 2304 be adopted at this time, it should not be allowed to overturn the prior settled decisions of the Department to the prejudice of those rights which have been acquired thereto in reliance upon the previous construction, by which the Department had long been governed and under which the right now claimed was always recognized.

The questions thus raised were before the Department in the appeal of Julian D. Whitehurst (32 L. D., 356), and at that time fully considered and determined. That no person can serve another in any capacity and thereby create a legal obligation until the tendered service for the particular duty is accepted, either actually or constructively, is self-evident. The fact that such service is solicited is immaterial. No different rule applies when the United States is a party. In the organization of the army of the United States the individual presents himself in pursuance to the call for troops for entry into such service. This is the tender for acceptance or rejection on the part of the United States. This tender must be presumed to have been made with full knowledge of the applicant that he must possess certain qualifications and submit to certain conditions, and unless these are fully met, his tender will be rejected. Among other of those qualifications is proof that the applicant is physically able to perform the duties of a soldier. He must also submit to the rules and regulations of war and change his status from civilian to soldier. It is contended that the evidence of acceptance on the part of the United States is the enrollment of the applicant, notwithstanding this may have taken place prior to a physical examination or an inspection by the duly authorized officer of the United States. To this the War Department was unwilling to accede. While enrollment is evidence of the then-existing intention of the applicant to take the necessary steps to complete his entry into the army, yet no duty is imposed, other than that arising from patriotic impulse, to continue the tender, submit to medical examination and inspection and complete the contract whereby his status is irrevocably changed, so far as any act of his is concerned.

But intention will not make a man a soldier, unless accompanied or followed by the acts necessary to constitute a change of his state from civil to military. The question before us is not what he intended to do, or how much he actually had done, how far his intention had been carried out, when the defendants assumed to exercise military authority over him. If he was not then a soldier, his previous expressions of intention to become one, or *even his supposition that he was*, would not make him one.

Tyler v. Pomeroy (8 Allen, 480, 504).

Therefore, enrollment alone cannot be accepted as conclusive evidence that the United States has accepted the proffered services. Muster into the service is the regular formal method of completing the conditional contract and giving finality to the proceeding on the part of both parties thereto. Surely no duty rests upon the United States to accept the tendered service, regardless of failure on the part of the applicant to meet the specified requirements. The United States has in such cases always reserved the right of individual selection and the general practice is to exercise it. Until this right is exercised or waived, the proposal of the applicant can only be considered as a continuing one, and, until acceptance, no duty is imposed upon either party. While it is true that in many instances during the civil war, the exigencies of the service occasioned many irregularities in the procedure, and the acceptance of the proffered services of the volunteer was not always evidenced by a formal muster in, yet it is not believed that in any instance was it evidenced by enrollment alone. When there was no formal muster in, the evidence was supplied by such acts on the part of the government, acquiesced in by the soldier, as compelling submission to the rules of war and military discipline, giving and accepting pay, subsistence, etc., and such acts as clearly evidenced a change of status from civilian to soldier. And it is not believed that constructive muster-in is ever to be resorted to where enrollment was in due course followed by actual formal muster-in. To extend it farther would be in effect to include all those who enrolled for service whether accepted or not. The volunteer who enrolled and was rejected occupied up to that time exactly the same position as the ones who enrolled at the same time and were afterwards accepted, yet no one would seek to maintain that he was in the army of the United States. It is urged that because the accepted volunteer was paid from date of enrollment, that his position was thereby changed; that the effect of acceptance as evidenced by a formal muster-in, was retroactive, and that he was paid from that date by virtue of his status as a soldier in the army of the United States. The Department, however, is of opinion a better reason for such payment is presented, not inconsistent with the view that until acceptance the volunteer was not in the army of the United States, namely, that by reason of the completion of the contract on the part of the volunteer, a just and equitable claim was established as against the United

States to remunerate him for the time taken from his ordinary employment and which would otherwise, so far as material gain is concerned, be entirely lost to him. But the recognition of this equitable claim by the United States could not operate to charge him with any dereliction of duty prior to the actual change of his status from civilian to soldier. And there appears to be ample justification for the payment of such equitable claims in the language of the various statutes, though the time for the commencement thereof is not specifically fixed at date of enrollment. (See act of July 24, 1861, 12 Stat., 274; act of August 6, 1861, 12 Stat., 326.) Had the person for whose benefit these acts were passed been in the army of the United States, such additional legislation would have been unnecessary, and it would seem, therefore, to be a legislative recognition of the ruling of the War Department that prior to muster-in such persons were not in the army of the United States.

After a careful consideration of all the matters presented in support of this contention, the Department is of opinion the same was correctly decided in the case of Julian D. Whitehurst, *supra*, and the rule then announced will not now be disturbed.

The plea that the right claimed is a vested one acquired under prior rulings of the Department, and therefore cannot now be disturbed, is not supported by the citation of authority, other than departmental decision in the case of Elijah C. Putman (23 L. D., 152). The facts presented and the question decided in said decision were entirely different from the one now involved. The language used therein in reference to the service of Putman was unnecessary to a determination of the issue and was mere *dictum*. An erroneous practice of the land department would not be binding upon the Department, however long continued, and however loath the Department may be to disturb a settled practice, its plain duty forbids its recognition thereof, when contrary to the language of the statute.

For the reasons herein stated, and those set forth in the carefully considered case of Julian D. Whitehurst, *supra*, the motion for review is denied.

HOMESTEAD ENTRY—ADDITIONAL—SECTION 6, ACT OF MARCH 2, 1889.

AUGUST MEISNER.

By the exercise of the right to make additional homestead entry conferred by section 6 of the act of March 2, 1889, even though for a less amount of land than might have been taken thereunder, the entryman thereby exhausts the privilege granted by said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 6, 1905. (C. J. G.)

An appeal has been filed by August Meisner from the decision of your office of June 6, 1905, holding for cancellation his cash entry for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 43 N., R. 24 W., Marquette, Michigan.

It appears that on December 24, 1898, Meisner made homestead entry No. 9087 for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, T. 42 N., R. 25 W., which he commuted July 18, 1900, under section 2301 of the Revised Statutes. He made additional homestead entry No. 10359 on October 16, 1901, under section 6 of the act of March 2, 1889 (25 Stat., 854), for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 42 N., R. 25 W., which he commuted March 11, 1903. He was also allowed to make additional homestead entry No. 11167 on September 9, 1903, under said section 6, for the land first described herein, which he commuted to cash entry No. 20534 December 27, 1904. The latter entry is the one now in question.

The several entries of Meisner were for non-contiguous tracts of land. Your office correctly held that his additional entry of October 16, 1901, under section 6 of the act of March 2, 1889, exhausted his homestead right, notwithstanding he did not secure by such entry sufficient land to complete the maximum quantity of 160 acres. By the terms of that section, even though standing alone, it is clearly susceptible of such construction and no other. But the act of 1889 as a whole relates to the one and common subject of the acquisition of homesteads on the public lands, and therefore it is to be construed *in pari materia* with the original homestead law. Only one entry is allowed under said law and if the applicant thereunder elects to enter less than 160 acres he exhausts his homestead right, unless it is otherwise specifically provided by law. There are numerous such special laws and the act of 1889 is one of them. It provides in section 6 thereof, under which Meisner made his additional entries:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws.

Following the construction placed upon the original homestead law and the practice thereunder, when Meisner made his additional entry of October 16, 1901, and elected to enter less than enough to

make up 160 acres, he exhausted his right, as he was only entitled to the exercise of one privilege of additional entry under said section. Nor is there any other known act allowing additional entries in certain instances, under which the entry in question can be allowed to remain intact.

The decision of your office herein is affirmed.

FORT ASSINNIBOINE MILITARY RESERVATION—FOREST RESERVE LIEU
SELECTION—ACT OF JUNE 4, 1897.

CHARLES ZIEGLER.

Lands formerly embraced within the Fort Assinniboine military reservation, and opened to entry by the act of April 18, 1896, are subject to selection in lieu of lands within a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 7, 1905. (J. R. W.)

Charles Ziegler, by Walter B. Sands, attorney in fact, appealed from your decision of March 31, 1905, rejecting his selection, No. 10917, your office series, under the act of June 4, 1897 (30 Stat., 36), for lot 9, Sec. 7, T. 32 N., R. 16 E., and lot 2, Sec. 10, T. 32 N., R. 15 E., M. M., Greatfalls, Montana (46.06 acres), in lieu of lot 1, Sec. 16, T. 1 S., R. 7 E., S. L. M., in the Uinta forest reserve, Utah (40 acres).

The land selected lies in the abandoned Fort Assinniboine military reservation. Your decision rejected the selection because—

the act of April 18, 1896 (29 Stat., 95), and instructions thereunder of May, 1896 (unreported), provide "that all lands which have been or may hereafter be excluded from the limits of the Fort Assinniboine military reservation in the State of Montana shall be open to the operation of the laws regulating homestead entry except section twenty-three hundred and one, Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands and mineral lands, and shall not be subject to sale under the provisions of any act relating to sale of abandoned military reservations." As the disposal of said lands is restricted to the various forms of entry specially designated in the act, they are not subject to disposal under any other law regulating the disposal of public land and hence are not subject to selection under the act of June 4, 1897.

This is claimed to be erroneous, and it is argued that—

It is probably true that the land in this abandoned military reservation would not be open to entry under any existing land laws except those mentioned but it did not exclude by implication later enacted laws that clearly authorized the entry of lands that were then open to settlement and were of a character contemplated by the later act.

The act of July 5, 1884 (23 Stat., 103), and act of August 23, 1894 (28 Stat., 491), provided generally for disposal of abandoned military reservation lands in a specific manner, after appraisal, and with

view to obtaining for the government the enhanced value to which such lands had appreciated during their state of reservation. The act of April 18, 1896, as to this particular reservation provided that the lands therein, except one mile square embracing the government buildings—

shall be open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands, and shall not be subject to sale under the provisions of any act relating to the sale of abandoned military reservations.

By section 2 all entries theretofore made under "the homestead, townsite, desert land, or mineral land laws" were validated and, if canceled, were directed to be reinstated. Section 2301, Revised Statutes, referred to in the act of April 18, 1896, was that permitting commutation of a homestead entry by payment of the minimum price after fourteen months from date of the entry on proof of settlement and cultivation for that period required by the section as amended by section 6 of the act of March 3, 1891 (26 Stat., 1095, 1098). The policy of securing to the government an enhanced value for the lands in this military reservation was thus abandoned and the restriction of the classes of entries permitted was with view to securing development of their resources by improvement, cultivation, residence, reclamation from desert character, or mineral exploration, such as was required by the several laws under which entries of them were permitted.

By the act of June 4, 1897, the United States, in furtherance of a public policy, sought to acquire complete title to all lands held in private right in the forest reserves. To secure that object it proposed to the owner of lands in a forest reserve in lieu of such lands the right to select "a tract of vacant land open to settlement," and by the act of June 6, 1900 (31 Stat., 588, 614), "vacant, surveyed non-mineral public lands which are subject to homestead entry." The lands in this abandoned military reservation are of the class thus specified.

It was within the power of Congress to offer any unappropriated lands in such exchange, and a proper construction of the acts of June 4, 1897, and June 6, 1900, later in date than the act of April 18, 1896, is to extend the modes by which such lands may be appropriated, nor does this construction interfere with any declared policy of the former act, which did not confine the modes of appropriation to those requiring settlement, residence and cultivation, nor did it enact in terms that such lands should be appropriated in those modes only. That act in form and terms merely excepted them from operation of the acts of 1884 and 1894, *supra*, providing generally for disposal of abandoned military reservation lands, and provided that they should be disposed of in other modes specified. It is not inconsistent with

the act of 1896, nor violative of any express or implied policy of Congress, to make them subject to yet other modes of appropriation, and in offering any "vacant land open to settlement," or "vacant, surveyed, non-mineral public lands which are subject to homestead entry," it offered to the owner of lands in a forest reserve any such described lands not in terms reserved for disposal in a specially restricted manner, or for attainment of some declared public purpose.

The cases of William C. Quinlan (30 L. D., 268); Joseph S. White (ib., 536); State of Utah (ib., 301); Webb McCaslin (31 L. D., 243); W. D. Harrigan (29 L. D., 153); Hiram M. Hamilton (32 L. D., 119); James Page (32 L. D., 536), are not inconsistent herewith. Examination of these cases will show that they fall into one or more of three general classes: (1) Where by act of Congress lands are directed to be disposed of under some specific laws only, or (2) for discharge of specific trusts charged thereon, or (3) in a specific manner in furtherance of an indicated policy, as to secure agricultural development by resident owners.

In the act here considered no such intent, object, or policy appears. The act of April 18, 1896, *supra*, merely excepted the land from operation of the acts of July 5, 1884, and August 23, 1894, and provided for their disposal under other acts, among which were the homestead laws without the commutation privilege. The acts to govern their disposal were of various character, excluding the purpose of assuring a resident agricultural holding. There was no trust requiring their sale for raising of a fund for a particular object; there were no words of exception or limitation to disposal under the acts named to the exclusion of any other law. When Congress by the acts of June 4, 1897, and June 6, 1900, offered "vacant land open to settlement," and "vacant, surveyed non-mineral public lands which are subject to homestead entry," these lands being of such class, became subject thereto.

Your decision is hereby reversed and the papers are remanded to your office for adjudication upon the merits.

SUIT FOR CANCELLATION OF PATENT—PRACTICE—HEARING.

MARY E. COFFIN.

As between rival applicants for the same land, the prior settler must maintain his prior right by continued compliance with the law.

Suit for the cancellation of a patent will not be advised by the land department merely because such patent was inadvertently issued; but it must appear that some interest of the government, or of some party to whom it is under obligation, has suffered by such inadvertent action.

Where patent has inadvertently issued for a tract of land, the land department, notwithstanding the title has passed out of the government, has authority to order a hearing between claimants under the patent and persons asserting

adverse rights to the land, with a view to determining the advisability or necessity for bringing suit for cancellation of the patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 8, 1905. (J. R. W.)

The Department is in receipt of your letter of September 14, 1905, transmitting exemplified records in Mary E. Coffin's selection, number 1182, your office series, under the act of June 4, 1897 (30 Stat., 36), and John Glode's homestead application, conflicting as to lots 5 and 6, Sec. 13, T. 65 N., R. 18 W., 4th P. M., Duluth, Minnesota.

The record shows that Mrs. Coffin made application, in due form and compliance with existing regulations, October 7, 1899, for these tracts, then unsurveyed, which was found regular and approved for patent April 20, 1902, and May 25, 1902, in inadvertent violation of then existing regulations of December 18, 1899 (29 L. D., 391, 393), patent issued therefor, the lands being then unsurveyed, and the regulations providing that patent should not issue upon selection of unsurveyed lands until four months after receipt at the local office of the approved township plat of survey.

February 8, 1905, the approved township plat of survey was filed in the local office, and on that day John Glode filed his homestead application for these and other tracts, alleging settlement thereon June 13, 1898. He further filed affidavit, corroborated by two witnesses, that—

he continued to reside on, improve and cultivate said land with the intention of entering the same as a homestead until November 15, 1899, . . . raised two crops on said land and made improvements thereon of the value of from \$100 to \$150, . . . viz: a house about 12 x 14 feet in size, comfortable to live in at all seasons, about $\frac{1}{4}$ an acre cleared, about two rods square in cultivation, and about $\frac{1}{4}$ of a mile of trail cut; as a settler on the land affiant was one of the petitioners for survey of said township, but on or about the 1st day of November, 1899, affiant learned that said land had been scripped, and was advised that said scrip filing on said land would bar his settlement; but affiant says that at the time said scrip application for said land was made he was an actual settler thereon.

He prayed a hearing and cancellation of the selection.

June 3, 1905, your office ruled Mrs. Coffin to surrender her patent, demanded reconveyance of the land within sixty days and an abstract of title, showing revestiture of the United States with good title. August 31, 1905, the local office returned proof of service, and reported no action had been taken. Upon these facts your office recommended that suit be brought to annul the patent.

September 16, 1905, counsel for Mrs. Coffin filed in the Department a request that—

the matter of establishing the right to the land patented be first considered and the rights of the respective applicants considered before further action is taken; as the selector . . . is willing to make any reconveyance possible and consistent with what is lawful in the matter.

This communication was referred to your office for recommendation and report, and November 4, 1905, your office reported that:

Considering all the facts and circumstances in connection with this case, this office would not recommend that a hearing be ordered, in the absence of a written pledge from the patentee, Coffin, that she will faithfully abide by the final judgment of the Department in the premises, and deed the land to the Government, freed from incumbrances in case it is finally held that the rights of the homestead claimant are paramount.

Glode fails to set out facts entitling him to annulment of Mrs. Coffin's patent. While he alleges settlement, residence, improvement and cultivation, he fails to allege that the prior right thereby acquired has been prosecuted and maintained. It is well settled that between rival applicants for the same land, the prior settler must maintain his prior right by continued compliance with the law. *Northern Pacific R. R. Company v. McCabe* (29 L. D., 30); *McInnes v. Cotter* (21 L. D., 97, 98); *Meyer v. Northern Pacific Railway Company* (31 L. D., 196). This the affidavit does not assert. Its implication is that on being advised of the selection he no longer prosecuted and maintained his settlement. This is amendable, and though the affidavit is clearly defective, it is assumed for purposes of this decision that such amendment is made.

While the land department by issue of patent loses jurisdiction to adjudicate the rights of the parties to the land, yet there remains a duty to be performed by the Department when its aid is sought by a request to bring suit for cancellation of a patent. It does not follow as a matter of course that such suit should be brought merely because patent issued inadvertently. It would be mere formalism to obtain cancellation of the patent if the Department must on the existing facts at once again issue patent to the same party. (See *O'Shee v. Coach*, 33 L. D., 295.) It is the duty of this Department, before asking aid of the Department of Justice for correction of its errors, to ascertain whether the interests of the United States, or of some party to whom it is under obligation, have suffered by its own misprision. It is clear that no interest of the United States has suffered because no question is raised but that the United States got good title to the tract relinquished in the exchange, nor yet that the land selected and patented was not of the kind and character offered by the United States. The principles applicable are the same as apply in controversies between private parties for cancellation of conveyances, and if there be no substantial equity in the government to demand relief, it must be defeated in such suit. *East Omaha Land Company* (21 L. D., 179).

It is, moreover, one of the established powers of the land department to order hearings in such cases for obtaining information necessary for its action, as well after patent has gone out to determine the

advisability or necessity of bringing suit for cancellation, as to determining questions arising as to rights in public lands not patented. Thomas J. Laney (9 L. D., 83, 85); Bullock v. Central Pacific Railroad Company (11 L. D., 590, 592).

If Glode be willing to assert and will undertake to prove the maintenance of his residence and due compliance with the law up to issue of the patent, a hearing will be granted, on notice to the selector, and the local office will find the facts as upon a contest against an existing entry. Such finding will be examined by your office as upon an appeal by the party whose right may be found, prior to issue of the patent, the inferior one, and the proceeding will be transmitted to the Department for its information in determining the advisability of instituting suit for cancellation of patent. Should Glode not allege residence in compliance with law to the time that patent issued, and renew his request for a hearing within sixty days from service hereof, the patent, though inadvertently issued, will be allowed to stand.

STATE SELECTION—PREFERENCE RIGHT—FOREST RESERVE LIEU
SELECTION—ACT OF JUNE 4, 1897.

CRONAN v. WEST ET AL.

The preference right, for a period of sixty days from the filing of the township plat of survey, accorded the State by the act of March 3, 1893, within which to make selection of lands under grants to the State, does not segregate the lands against other applications, but they should be received, subject to the State's right, and, if that be not exercised, take effect, if otherwise entitled to approval, as of the date of their presentation.

Where a selection tendered under the exchange provisions of the act of June 4, 1897, is in conflict, in part, with prior pending applications, it should not, for that reason, be rejected in its entirety, but the selector should be afforded opportunity to protect his rights by proper proceedings.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 9, 1905. (J. R. W.)

John Cronan appealed from your decision of February 8, 1905, rejecting his application under the act of June 4, 1897 (30 Stat., 36), to select lands in lieu of land relinquished to the United States in a forest reserve, as to certain lands therein included described as the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, T. 43 N., R. 2 E., B. M., Coeur d'Alene, Idaho.

August 21, 1903, the township plat of survey was filed in the local office. On that day Samuel J. Gilbert presented his application for homestead entry for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, with other land, which was suspended pending the State's sixty days preference right under the act of March 3, 1893 (27 Stat., 572, 592).

October 19, 1903, John Cronan, by J. J. Skuse, attorney in fact, filed his application (as stated in his brief) to select the W. $\frac{1}{2}$, Sec. 3, W. $\frac{1}{2}$ and NE. $\frac{1}{4}$, Sec. 4, and SE. $\frac{1}{4}$, Sec. 5, in lieu of lands relinquished to the United States in a forest reserve. In fact no such application is found in the papers transmitted by your office, and the only paper of similar character is one dated October 19, 1903, marked "Copy," and includes only the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, which is referred to in letter of counsel addressed to you of date April 19, 1904, wherein he describes the same lands and says:

I herewith file a duplicate deed of relinquishment by John Cronan to the United States, a duplicate of abstract of title and a duplicate affidavit of non use of said base land, also a duplicate non-mineral and non-occupancy affidavit as the records of your office show that the original papers connected with this application were lost in the local land office after the same had been filed therein October 19, 1903, by the said Cronan.

Referring to Cronan's application, the local office, February 8, 1904, report, among other things, that—

October 19, 1903, John Cronan made lieu selection application for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, . . . the plat . . . was filed . . . August 21, 1903, and no applications were received therein except those of settlers who made affidavits as to settlement, residence, etc. . . all including these being suspended until the expiration of sixty days allowed the State of Idaho for preference right of selection. The said application of Cronan having been made two days prior to expiration of this time, on October 19, it was considered premature and of no effect. On October 21, 1903, Frei made timber and stone sworn statement for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, . . . Sec. 4, . . . November 28, 1903, notice was served upon John Cronan of the rejection of his selection for the land . . . October 21, 1903, Theodore C. West applied to make second sworn statement for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of 3, having previously made sworn statement for land in the Lewiston land district . . . Cronan's application as to SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ was rejected because of said application of West.

Your decision states that the application of Cronan for the land first herein described and in conflict was received by the local office October 19, 1903, and suspended until November 28, 1903, and then rejected; that by letter of February 16, 1904, B. C. Tiffany, attorney for Cronan, transmitted to your office affidavits of Cronan and J. J. Skuse that applications by Cronan had been filed at the local office October 19, 1903, "to select under the act of June 4, 1897 (30 Stat., 36), certain described lands," "all being for the land here in question," and that attached to Cronan's affidavit a certificate by the register of the local office states—

This is to certify that John Cronan presented lieu selections for lands in T. 43 N., R. 2 E., which were considered by the register and receiver as premature and he was requested to ask in writing that the same be filed on October 19, 1903; that said request was made and papers received and were being examined by the tract books when they mysteriously disappeared from

the office and have never been seen since; that the written descriptions of the lands selected are the same in the written request to have them filed, and in the list mentioned in the within affidavits of John Cronan and his attorney, John J. Skuse, but the basis of the selection cannot be certified by me.

The record transmitted to the Department is evidently incomplete. Not only the original application papers are missing from the files but also the letter of counsel B. C. Tiffany, of February 16, 1904, both the affidavits said to have been therewith forwarded and the certificate of the register above set out in your decision. It is however accepted by the Department that such papers as the affidavits of Cronan and Skuse, and certificate of the register must have existed in the record at the date of your decision February 5, 1905.

The Department therefore as basis for this decision accepts it as established, notwithstanding the evident defect of the record, that October 19, 1903, Cronan, by Skuse, attorney in fact, filed application under the act of June 4, 1897, *supra*, for the lands described in the caption of this decision; that at the applicant's written request the local office received them; that while the local officers were examining the tract book with reference to said lands Cronan's selection papers were abstracted from the records or were lost by the local office and that no action was taken by the local officers upon Cronan's application until November 28, 1903, when it was rejected because of three several partial conflicts.

(1) With Gilbert's homestead application as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, filed August 21, 1903, with an affidavit of prior settlement and residence.

(2) With Frei's timber and stone application as to the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, made October 21, 1903.

(3) With West's application to file a second timber and stone application as to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3.

Your office held that the local office erred in every action relative to the case "except the action accepting the homestead application of Gilbert and the lieu selection of Cronan and suspending the same pending the sixty day preference right period of selection by the State." In so far your decision was correct and is affirmed. The preference-right given by the act of March 3, 1893, *supra*, is analogous to the preference right of a successful contestant and does not segregate the land against other applications, and they are entitled to be received, subject to the State's right, and, if that is not exercised, take effect from their presentation, if in form entitled to be approved. As August had 31 days, the State's preference right expired October 20th.

Your decision, however, rejected Cronan's entire selection, and in so doing was erroneous. The local office and your office should not have rejected the selection entire. (Frederick W. Kehl, July 9,

1903, unreported; Aztec Land and Cattle Company, 34 L. D., 122.) In so far as Cronan's application was rejected entire because of partial conflict with a prior selection it is reversed and the case is remanded for further proceedings appropriate thereto.

SCHOOL LAND-INDEMNITY SELECTION-PURCHASER.

BURTIS *v.* STATE OF KANSAS ET AL.

Where public lands of the United States are in good faith purchased from a State in the belief that the State has acquired title thereto under its school grant, and in faith of such purchase are held and occupied for many years, entry thereof by a third party should not be allowed without first affording the State an opportunity to make good the title purported to be conveyed by it, by assigning a proper and sufficient basis and making selection of the land under its school grant; and in case of failure on the part of the State to make the title good, the present claimant through purchase from the State should be afforded opportunity to protect his rights by himself making entry of the land under the public land laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 16, 1905.* (F. W. C.)

The Department has considered the appeal by Clyde L. Burtis from your office decision of March 22, 1905, rejecting his application to make soldiers' additional homestead entry, as assignee of Thomas Marsh, under section 2306 of the Revised Statutes, of the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 34, T. 4 S., R. 8 E., 6th P. M., Topeka land district, Kansas, and affording the State of Kansas the opportunity to make selection of said tract as school indemnity land upon furnishing a proper basis therefor, and failing therein that Williams be permitted to complete entry of the land.

December 14, 1901, Burtis was permitted to make homestead entry of the tract here in question, the same appearing to be public land open to such entry. In May, following, he tendered an application, as assignee of Thomas Marsh, to enter the same tract under the provisions of section 2306 of the Revised Statutes. No question seems to be raised as to the validity of the right sought to be exercised, Marsh being entitled to a soldiers' additional homestead right for eighty acres, and Burtis was advised that he could not complete his original entry made December 14, 1901, in this manner, but that should he relinquish his homestead entry the additional right sought to be used might be permitted. Before this was consummated, however, Edward M. Williams, present claimant to the land, through the State of Kansas, filed certain corroborated affidavits showing his connection with the land and the chain of title under which he claimed, upon which hearing was ordered.

At the hearing the attorney-general of the State, at the instance of the Governor, over the objection of Burtis, filed a verified petition of intervention, alleging, in substance, that the authorities of the State, for a valuable consideration, had conveyed this tract to one William H. Smith by patent regularly issued by the Governor of the State and other proper authorities; that title thereto had passed by mesne conveyance to Williams, who had for years held the title in the belief that his grantors were the absolute owners of the tract, and it was asked that should it be held that the land was still the property of the United States, the State, through its proper officers, upon furnishing a proper basis therefor, be permitted to make selection of the land as school land indemnity, in order to protect the rights of those who had held the land through the conveyance from the State.

Upon the conclusion of the hearing, the local officers found, among other things, that on the 15th day of June, 1871, the State of Kansas executed and delivered to one William H. Smith a patent for the land in controversy and that through mesne conveyances from said Smith, all of which were warranty deeds, the land was conveyed to Edward L. Williams; that at all times since the issue of said patent the land has been cultivated by its owners and that during all of such time the land has been enclosed by a fence; that the present claimant through the State purchased the land for a valuable consideration and in good faith, and that during all the time he has been the owner of said land, has cultivated the same and has had it enclosed by a fence; and that taxes have been legally assessed annually upon said tract since 1871 and paid by the several owners of the tract up to 1902; also, that the tract is now worth \$40 per acre.

These findings are not seriously disputed, and while it is not clearly made to appear how the error arose that misled the State into patenting this land, it is clear that it was supposed to be and was treated as a part of the lands granted to the State in support of common schools.

The land is in a community which has been settled and farmed for a number of years, and Burtis was undoubtedly fully apprised as to the actual condition of the lands at the time he first sought to make entry thereof.

Your office holds that the case falls within the category of cases decided by the Supreme Court of the United States beginning with that of *Atherton v. Fowler* (96 U. S., 513), declaring illegal any attempt to make entry of the public lands occupied and improved by another honest claim and color of title, referring particularly to the cases of *Jones v. Arthur* (28 L. D., 235), *Butler v. State of California* (29 L. D., 610), and *Anderson v. Roray* (33 L. D., 339).

In the appeal from the office decision Burtis questions the application of the cases just referred to, claiming that Williams, and those

before him, were not occupying the land under color of title because it is not shown that the State ever formally presented an application to select this land or ever intended to make selection thereof as school land indemnity.

The books define as color of title that which in appearance is title but which in reality is not title. It is true that a title was not acquired by prescription as against the United States by reason of the possession gained under the deed issued by the State for this land, but it is nevertheless believed that Smith, and those claiming under and through him, occupied this land under a color of title. Their good faith in the premises is in nowise questioned and the Department fully agrees with the decision of your office and the local officers protecting such long continuous possession as against one seeking to appropriate the lands as against such prior occupants.

It is the opinion of this Department that the State should be permitted to make its title good, and to that end it should be afforded a reasonable time within which to make formal selection of the land, upon a proper and sufficient base. Should the State fail to make selection as allowed, the present occupant through purchase from the State should be afforded a reasonable time in which to protect his occupancy by himself making entry under the land laws, and upon completion of selection by the State, or entry by Williams, the application by Burtis will stand rejected.

The decision appealed from is accordingly affirmed.

UINTAH INDIAN LANDS—MINING CLAIMS—ACT OF MAY 27, 1902.

RAVEN MINING COMPANY.

The limit of the grant to the Raven Mining Company made by the act of May 27, 1902, was the privilege to locate, under the mining laws, one hundred mining claims upon the unallotted lands of the Uintah and White River tribes of Ute Indians, and neither that act nor any of the subsequent acts extending the time of opening said unallotted lands relieved said company from compliance with the provision of section 2325 of the Revised Statutes requiring payment to be made for lands embraced in a mining claim as a condition to the issuance of patent therefor under the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 19, 1905. (F. W. C.)

The act of Congress approved May 27, 1902 (32 Stat., 245, 263), provides for the allotment of lands to the Uintah and White River tribes of Ute Indians of eighty acres of agricultural lands which can be irrigated, to each head of a family, and forty acres of such

land to each other member of said tribes, and for the restoration to the public domain of the unallotted lands on October 1, 1903.

With reward to the unallotted lands it was provided:

That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mineral laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

The time for opening the unallotted lands in the Uintah reservation, as provided for in the act of May 27, 1902, was extended to October 1, 1904, by the act of March 3, 1903 (32 Stat., 982, 998); again to the 10th of March, 1905, by the act of April 21, 1904 (33 Stat., 189); and again to the 1st of September, 1905, unless the President should determine that the same might be opened at an earlier date, by the act of March 3, 1905 (33 Stat., 1048, 1069). This latter act provided that these lands should be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which they may be settled upon, occupied and entered by persons entitled to make entry thereof. The plan contemplated was one that had been followed successfully in opening the unallotted lands in other reservations and contemplated a drawing which would fix the order for presentation of claims, thus avoiding the difficulties and vexatious contests incident to an unrestricted rush and settlement upon the lands.

As the act of 1902 had granted preferential rights to locate mining claims not to exceed 640 acres of contiguous lands generally to those holding leases or permits to negotiate leases from the Indians, also especial rights to the Raven Mining Company, it became necessary to identify and separate the mineral claims located under these privileges before the opening of the general body of the lands under the plan to be prescribed in the President's proclamation. The act of March 3, 1905, provides:

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest

Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two; such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two-hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company, for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation.

In the proclamation issued by the President July 14, 1905, governing the opening of the unallotted lands in the Uintah Reservation there was excepted from the lands to be opened "such mineral lands as may have been disposed of under existing laws."

It will be noticed that by the act of May 27, 1902, the Raven Mining Company was not restricted to 640 acres of contiguous mining lands, but was authorized to "locate 100 mining claims of the character of mineral mentioned in its lease." This act made no further provision with regard to the completion of title to these mining claims which the Raven Company was authorized to locate and there would seem

to be no reasonable doubt but that, in the absence of other legislation, title to these claims could have been obtained only in the ordinary manner provided by the mining laws for the completion of title to mining claims elsewhere upon the public domain, and this could have been accomplished only by a compliance with section 2325 of the Revised Statutes, which provides as follows:

Sec. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor-General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Under the act of March 3, 1905, *supra*, the locations of the Raven Mining Company were directed to be made, and they were made, in the form of lode claims. The report of the inspector, appointed by the Secretary of the Interior to inspect the claims after their location, shows that they contain the character of mineral mentioned in the company's lease, and to which it is entitled under the act of May 27, 1902. There would seem to be no question, therefore, as to the price to be paid on account of these mining locations if, under the law, any charge is required. The Raven Mining Company was, however, by act of 1905, relieved from compliance with many of the conditions

prescribed in section 2325 of the Revised Statutes, and the sole question here presented for consideration is as to whether said company has been relieved from the payment at the rate of \$5.00 per acre, generally required in completion of title to mineral lands located as lode claims. Your office required that such payment should be made preliminary to the issuance of the patent of the United States for the lands located, and it is from this requirement, which was contained in a letter addressed to said company, dated July 3 last, that an appeal has been taken to this Department.

The matter has been fully and thoroughly presented, both orally and by brief. The contention of the mining company is, in effect, that the act of 1902 made a grant *in presenti* of the lands to be located as mining claims made in consideration of the surrender of its lease on account of which large expenditures had been made upon the lands covered thereby, which grant acquired precision by the subsequent locations made, the title vesting thereupon by relation as of the date of the original act; that as the act of 1905 omitted any requirement for a payment preliminary to the issue of patent, none can now be exacted, and, as the other conditions prescribed in the act of 1905 have been complied with, that the patent of the United States should forthwith issue.

It must first be remembered that under the lease with the Indians they would presumably have been entitled to large royalties, which are terminated at least upon the opening of the lands to entry. The company has indeed resisted the collection of any royalties after the passage of the act of 1902, but under date of August 3, 1903, this Department, in a communication to Mr. Le Roy D. Thoman, representing the company, concurred in the views of the Commissioner of Indian Affairs that this company must pay the prescribed royalties under the lease until the date of the opening of the lands to settlement and entry. The position thus taken by the Department negatives the idea that the privilege granted this company by the act of 1902 to make certain mining locations amounted to an unconditional grant of the lands located, and after further and full consideration, the Department adheres to its former ruling and holds that the limit of the grant made by the act of 1902 was of a privilege to locate, under the mining laws, one hundred claims.

The act of 1902 makes it plain that it was the intention of Congress to appropriate for the benefit of the Indians, the entire proceeds derived from the sale of any part of the unallotted lands, subject only to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the provisions of said act. Under that act, homestead settlers upon the unallotted lands were specifically required to make payment for the lands entered at the rate of \$1.25 per acre, a condition not ordinarily exacted, and although the subse-

quent act of 1905, relating to these lands, contained no such provisions, yet, in the construction of the several acts bearing upon the opening of these lands, it was the opinion of this Department that the condition exacting payment of homesteaders found in the act of 1902 was not repealed by its omission from the act of 1905, thus preserving the fund created under the act of 1902 and appropriated for the benefit of the Indians. (See 33 L. D., 610.)

It is not doubted that Congress might have relieved this company from the payment of any sum in the completion of title to the lands authorized to be located, but when the whole matter is considered it seems more reasonable that Congress meant by the act of 1905 merely to relieve the company from making the formal proof required under the mining laws in the completion of title to mineral lands, and not to relieve this company from a payment of money which it would have been required to make in completion of its title under the act of 1902 and which that act had, as before stated, specifically appropriated for the use and benefit of the Indians.

In conclusion it may be added that the opening of the lands to entry and location was without the formal consent of the Indians and it seems unreasonable to assume that Congress meant to deprive them of the benefits secured under their lease made with this company and to grant away the lands without at least exacting the ordinary payment required by the mining laws, a sum which is presumably but small recompense for their right to royalties terminated by the disposition of the lands.

The decision appealed from is accordingly affirmed.

ARID LAND—WITHDRAWAL—SOLDIERS' ADDITIONAL APPLICATION—
ACT OF JUNE 17, 1902.

NANCY C. YAPLE.

An application to make soldiers' additional entry under section 2306 of the Revised Statutes, although filed prior to the passage of the act of June 17, 1902, and pending at the date of an order withdrawing the lands covered thereby under the provisions of said act, is not effective to except the lands from such withdrawal.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 19, 1905. (C. J. G.)

An appeal has been filed by Nancy C. Yaple, remote assignee of Meredith M. Hackett, from the decision of your office of July 3, 1905, rejecting her application to enter, under section 2306 of the Revised Statutes, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 10, T. 16 N., R. 31 E., Walla Walla, Washington.

The application in question was filed March 5, 1902, and forwarded to your office the same date. The land covered by such application, together with other lands, was withdrawn for irrigation purposes by departmental order of June 24, 1903, under the provisions of the reclamation act of June 17, 1902 (32 Stat., 388). The application was rejected, as stated, because of this withdrawal. It is urged in the appeal that the application having been filed prior to the passage of the act, as well as prior to the withdrawal, it was not affected by said act nor the order of withdrawal.

In the instructions of June 6, 1905 (33 L. D., 607), it is pointed out that there are two classes of withdrawals authorized by the act of June 17, 1902, known as "Withdrawals under the first form," and "Withdrawals under the second form," but it does not appear in the record under which form the land embraced in the present application was withdrawn. That, however, is unimportant in the determination of this case, as said instructions expressly prescribe, with respect to both forms, that after the withdrawals are made all applications for selections, locations, or entries of the lands covered by such withdrawals, excepting applications to enter "only under the homestead laws" lands withdrawn under the second form, shall be rejected, regardless of whether said applications are presented before or after the lands are withdrawn.

In the case of Cornelius J. McNamara (33 L. D., 520), it is held, referring to the act of June 17, 1902, that "by directing withdrawal of such lands 'from entry, except under the homestead laws,' Congress intended to inhibit any mode of private appropriation of such lands except by such entry under the homestead laws as requires settlement, actual residence, improvement, and cultivation;" and hence, none of these things being required under a soldiers' additional entry made under section 2306 of the Revised Statutes, that lands within the exception provided for in said act of June 17, 1902, are not subject to such entry. A similar ruling was made in the case of William M. Wooldridge (33 L. D., 525), wherein it is said—

that it was clearly not intended to leave lands withdrawn under the act of 1902, as susceptible of irrigation, subject to be taken by one holding a right under section 2306 of the Revised Statutes.

Furthermore the mere filing of the application in question was not sufficient to except the tract covered thereby from the subsequent action of Congress which led to its withdrawal for irrigation purposes. Hence, the fact that said application was filed prior to the act of June 17, 1902, and the order of withdrawal, was not effective to defeat said withdrawal. The most that the application can be said to have done was to protect any claim the applicant might have as against other applicants for the same land. It did not confer upon the applicant any right in the land as against the government,

or impair in any respect the power of Congress to appropriate the land to any public use it might deem proper. It did not operate to segregate the land so as to prevent its withdrawal by the government for the specific purposes contemplated by the act of June 17, 1902. In this respect a soldiers' additional application under section 2306 of the Revised Statutes is subject to the same rule applicable to any other mere inchoate claim. The principle herein stated is well established by the decisions of the Supreme Court in the cases of *Frisbie v. Whitney* (9 Wallace, 187), and *The Yosemite Valley Case* (15 Wallace, 77), and allied cases.

The decision of your office denying the application in question is hereby affirmed.

MARRIED WOMAN—SETTLEMENT—BITTER ROOT VALLEY LANDS—
SECTION 2, ACT OF JUNE 5, 1872.

MATELDA C. HUMBLE.

A married woman, not the head of a family, is not qualified, under the provisions of section 2 of the act of June 5, 1872, to make entry of lands in the Bitter Root Valley opened to settlement by said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 19, 1905. (C. J. G.)

An appeal has been filed by Matilda C. Humble from the decision of your office of May 2, 1905, holding for cancellation her entry, made under the act of June 5, 1872 (17 Stat., 226), for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, T. 7 N., R. 20 W., Missoula, Montana, on the ground that said Matilda C. Humble, being a married woman at date of settlement, was not entitled to make entry under said act. The appeal argues that she was not disqualified under said act by reason of the fact stated.

The tract involved is part of the lands in the Bitter Root valley, opened to settlement by the foregoing act, section 2 of which provides, among other things:

Said lands shall be opened to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers being heads of families, or over twenty-one years of age.

The construction claimed for this section in the appeal is that a person is qualified thereunder if "the head of a family, whether over the age of twenty-one years, or not, or if not the head of a family, then the person seeking to make the entry must be over the age of twenty-one years." And in this connection a distinction is

also claimed between the preemption law of 1841, embodied in section 2259 of the Revised Statutes, under which married women were held to be disqualified, and the law in question. The language of the act of June 5, 1872, is practically the same as that in the homestead law of 1862, found in sections 2289 and 2290 of the Revised Statutes, in part as follows:

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter.

Thus the preemption and homestead laws contain practically the same restrictions in the matter under consideration. The act of February 11, 1874 (18 Stat., 15), which amended the act of June 5, 1872, made this provision in section 2 thereof:

That the benefit of the homestead act is hereby extended to all the settlers on said lands who may desire to take advantage of the same.

In view of the legislation with respect to the lands of which the tract in controversy is a part, there is no doubt that the entry in question comes within the rules governing homestead entries, and it is well settled under the homestead law that a married woman, in the absence of evidence showing that she is the head of the family, is not qualified to make entry under said law. The act of June 6, 1900 (31 Stat., 683), removed a woman's disqualification under the homestead law resulting from marriage, but that act is effective only in cases where a settlement claim had been initiated prior to marriage.

The decision of your office herein is affirmed.

MINING CLAIM—ADVERSE—OATH—SECTION 2335, REVISED STATUTES.

MATTES *v.* TREASURY TUNNEL, MINING AND REDUCTION CO. (ON REVIEW).

All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes, except where authority for their execution is otherwise specifically given by statute.

The oath to an adverse claim, made by the agent or attorney-in-fact of the adverse claimant, under the act of April 26, 1882, must be verified before an authorized officer within the land district where the adverse claim is situated, in accordance with the provisions of said section 2335.

Where the oath to an adverse claim is made by the agent of the adverse claimant outside of the land district, although before a notary public whose jurisdiction extends throughout a county lying partly within and partly without the land district, such adverse claim is not properly verified within the meaning of said section 2335.

Departmental decision in case of *Lonergan v. Shockley*, 33 L. D., 238, in so far as in conflict with this decision, overruled.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 26, 1905.* (A. B. P.)

This is a motion by the Treasury Tunnel, Mining and Reduction Company for review of departmental decision of May 12, 1905, in the case of William F. Mattes against said company (33 L. D., 553), wherein it was held that an alleged adverse claim filed by the Company against the application for patent by Mattes to the Iron Side, and seventeen other lode mining claims, survey No. 15,342, Durango, Colorado, was not *upon oath*, as required by the statute, and was therefore invalid and without force or effect to stay the proceedings upon the patent application. From the facts as then presented, and undisputed, it appeared that the agent of the Treasury Company had pretended to make oath to the so-called adverse claim by the use of a telephone. He was at the time twelve miles distant from the officer, who attempted to administer the oath over the telephone. The Department held that an oath could not be legally administered in such manner, and that the requirement of the statute in this respect had not been complied with.

The motion for review is accompanied by the affidavits of the agent of the Treasury Company and two of its attorneys, which affidavits are to the effect that the agent in fact made oath to the adverse claim *before* the notary, in Ouray, Colorado, on the evening of August 25, 1902, and that it was after the oath had been administered and not before, as was represented to be the fact when the decision complained of was rendered, that the question arose as to the legality of an oath taken outside of the land district in which the claim is situated, which resulted in the agent going the next day into the land district and there undertaking to make the oath by the use of a telephone.

The contentions of the motion for review are in substance as follows:

1. That the Department erred in holding the adverse claim by the Treasury Company not to have been legally verified by the proceedings over the telephone.
2. That under the additional facts set forth in the affidavits now filed the adverse claim should be held to have been actually sworn to by the agent of the company in the presence of the notary, and thus legally verified.
3. That in any event the Department, in its discretion, should stay the patent proceedings until the suit instituted in court by the company shall be determined.

The matters involved in the first and third contentions were carefully considered when the decision complained of was rendered, and as to them it is sufficient to say that the Department is not convinced by anything in the motion, or in the brief of counsel accompanying the same, that its ruling on either of the points was wrong.

The second contention is based upon the assertion, now made for the first time, that the agent of the Treasury Company in fact made oath to the adverse claim *in the presence* of the notary. The transaction is stated to have occurred outside of the land district.

Conceding that the formal proceedings usually attending the administration of an oath were actually had, the question is presented as to the legal sufficiency, under the mining laws, of an affidavit, by the agent of an adverse claimant, executed before an officer outside of the land district where the claim to which the affidavit relates is situated.

The United States mining laws are contained in chapter six, title thirty-two, of the Revised Statutes, embracing sections 2318 to 2352, inclusive, and in certain acts of Congress relating to mineral lands and mining resources passed since the enactment of the Revised Statutes.

By section 2326 it is required that "where an adverse claim is filed . . . it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent" thereof, etc. Section 2335 provides, among other things, that—

All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office.

By act of April 26, 1882 (22 Stat., 49), it is provided:

That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

This act does not state where the agent of the adverse claimant may make oath to the adverse claim, or designate any officer who may administer it. For authority in this respect resort must be had to the provision of section 2335 that "all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated." This general provision embraces all affidavits under the mining laws except where authority for their execution is otherwise specifically given by statute.

While the oath of the agent of the adverse claimant in this case was made before a notary public outside of the land district where the claim to which the oath relates is situated, it appears that the jurisdiction of the notary, which was coextensive with his county, extended into and embraced a part of the land district. This, it is contended, is sufficient to bring the execution of the oath within the authority of section 2335. In other words, the contention is, in effect, that under that section any officer authorized to administer oaths, whose jurisdiction extends into and embraces any part of a land district, may, anywhere within his jurisdiction outside of the land district, administer oaths required under the mining laws relating to claims situated within such land district.

To support this contention the recent case of *Lonergan v. Shockley* (33 L. D., 238) is cited. That was a case where an application for patent and certain affidavits filed therewith were sworn to outside of the land district where the claims applied for were situated, before a notary public whose jurisdiction extended into a part of the land district. The Department, citing the case of *Corning Tunnel, Mining & Reduction Company v. Pell et al.*, decided February 17, 1877 (*Sickels' Mining Laws and Decisions*, 307, 308), and assuming the same to be controlling authority, held, without discussion, that the application and affidavits were properly verified. In the cited case, the Department, speaking through Secretary Chandler, of the above provision of section 2335, said:

I am of the opinion that under this statute an officer authorized to administer oaths *within* the land district may administer the same *without* the district, but within the jurisdiction.

Counsel have not referred to any other reported case of similar import, and none has been discovered after diligent research. On the other hand, it appears that shortly after the passage of the act of April 26, 1882, rules and regulations for the enforcement of its provisions were adopted by the Department, wherein, amongst other things, it was provided (Circular of May 9, 1882, 1 L. D., 685) that:

The agent or attorney-in-fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

This rule has existed ever since its adoption without change or modification. The Department is advised, through informal inquiry at your office, that it has been continuously and consistently enforced, and that, regarding it as an authoritative interpretation of section 2335, the uniform practice of your office for more than twenty years has been to require all affidavits under the mining laws, except where otherwise specially provided, to be verified before an authorized officer *within* the land district where the claims to which the affidavits relate are situated.

It needs no argument to show that the adoption of the rule involved a consideration and construction of section 2335. No officer is designated by the act before whom affidavits of agents or attorneys-in-fact of adverse claimants may be executed, and the verification of such affidavits necessarily falls within the general authority of section 2335.

Nor is argument required to prove that the two constructions of the section are inconsistent. The fact that the construction of 1877 related to affidavits by adverse claimants themselves, and that of 1882 to affidavits by agents or attorneys-in-fact of adverse claimants, can make no difference. In both instances the affidavits are verified under the same authority, except, as provided in the act of 1882, where the adverse claimant resides or is at the time beyond the limits of the district wherein the claim is situated; and it would be manifestly inconsistent to enforce one rule as to the verification of affidavits by adverse claimants not residing or at the time being beyond the limits of the district, and another and different rule as to the verification of affidavits by agents or attorneys-in-fact of adverse claimants.

The important question is whether the construction of 1877 or that of 1882 shall prevail. Upon careful and mature consideration of the whole subject the Department is of opinion that the latter is the true construction. It is in harmony with the ordinary and natural meaning of the language of the statute, and is believed to give effect to the legislative intention. Congress evidently had in mind both the jurisdiction within which, and the officer before whom, the affidavits were to be verified. Naturally, the jurisdiction would be one of federal creation and control; and it is expressly stated to be the *land-district* where the mining claims may be situated. The officer is any person authorized to administer oaths within such district. The reasonable and natural interpretation is that it was intended the verification should take place *within* the land-district; that is, before any officer *within* the land district who has authority, under either the federal or local laws, to administer oaths.

This was the view taken of the matter by the Department when the statute was first enacted. It was originally a part of the act of July 9, 1870 (16 Stat., 217), was reproduced in the act of May 10, 1872 (17 Stat., 91, 95), and was thereafter incorporated in the Revised Statutes. The language is the same throughout. The question of its construction first came before the Department, so far as the reported decisions show, in the case of *The Dardanelles Mining Company v. The California Mining Company*, decided October 18, 1873 (Copp's U. S. Mining Decisions, 161-162). It was there stated and held as follows:

The instructions issued under the act of July 26, 1866, required all affidavits to be made before the Register or Receiver.

The acts of July 9, 1870, and May 10, 1872, authorized them to be made before any officer within the land district who has authority to administer an oath.

This was done, doubtless, for the convenience of applicants, and the authority was limited to the land district, so as to make it practicable to punish those who might be guilty of perjury in making the oath.

As contemporaneous construction this interpretation by the Executive Department whose duty it is to administer the law is entitled to weighty consideration; and especially so in view of the fact that except for the short period from 1877 to 1882 such construction has been uniformly followed. Having so long prevailed, it should not be now departed from unless for very strong reasons, and none are apparent.

Moreover, this view is strengthened by a consideration of the subsequent legislation by Congress on the subject. By the further provisions of the act of 1882 it is declared:

(1) That the adverse claimant, if residing or at the time being *beyond the limits* of the district wherein the claim is situated, may make the required oath before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory; and

(2) That an applicant for mineral patent, *if residing beyond the limits* of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

From this legislation it is evident that, at the time of its enactment, Congress entertained the view that affidavits required by the mining laws could not be lawfully verified under section 2335, the only authority then existing on the subject, elsewhere than *within* the land district where the claims to which the affidavits related were situated. Such is the inference to be drawn from the provisions allowing oaths in the two specified instances to be made *without* the land district; in the one instance, where the affiant resided or was at the time *beyond the limits of the district*, and in the other, where the affiant resided *beyond the limits of the district*.

Again, by the act of January 22, 1880 (21 Stat., 61), section 2325 of the Revised Statutes was amended by adding thereto the proviso:

That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

By this act authority is given the agent of a claimant for patent to make the affidavits *only* where the claimant is not a *resident* of or

within the land district (Rico Lode, 8 L. D., 223); and the natural inference is that it was in the mind of Congress when the act was passed that affidavits by the claimant for patent were required to be made *within* the land district.

From this review of the statute and its history it appears that the construction of 1882 accords with that first given by the Department, in 1873, and is in harmony with the ordinary and natural meaning of the language used; that the legislation on the subject since the statute was enacted is strongly indicative that such construction gives to the law its intended effect; and that the uniform practice from 1873 to 1877 and from 1882 to the present time has been to require all affidavits under the mining laws, except where otherwise specially provided, to be verified *within* the land district where the claims to which they relate are situated.

It is unnecessary to continue the discussion further. In view of what has been said, even admitting the statute to be reasonably susceptible of either of the two interpretations, if it were a matter of first impressions, it is clearly the duty of the Department now to adhere to the construction which was first adopted, and which, except for the brief period stated, has been uniformly followed ever since. The motion for review is accordingly denied. The case of *Lonergan v. Shockley*, in so far as in conflict with the views herein expressed, is hereby overruled.

MILL SITE—CONTIGUITY TO VEIN OR LODE CLAIM—SECTION 2337, R. S.

BRICK POMEROY MILL SITE.

The provision of section 2337 of the Revised Statutes that: "Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes," construed. *Held*: The words "vein or lode," in said section, are not used in the restricted sense of indicating a body of mineral, or mineral-bearing rock, in place, only, but are used in the larger sense of designating a located vein or lode *claim*, and that only non-mineral land not contiguous to a vein or lode *claim* may be appropriated for mill-site purposes.

Direction given that all applications for mill-site patents which may be made and carried to entry before July 1, 1906, or which may, by protest or otherwise, without the fault of the applicant, be prevented from being carried to entry before that date, where the locations of the claims were made and perfected under the law in all other respects prior to January 1, 1904, shall be adjudicated, in respect to the matter of contiguity of the mill-site claims to vein or lode claims, under the practice which prevailed in the General Land Office prior to the departmental ruling in the case of Alaska Copper Company.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 26, 1905.* (A. B. P.)

December 23, 1903, the Henson Creek Lead Mines Company made entry for the Brick Pomeroy, Wall Street, and Amazon lode-mining claims, including the Brick Pomeroy mill-site, survey No. 16478 A & B, Gunnison, Colorado. The mill-site, which is in the form of a triangle, adjoins the Brick Pomeroy lode claim, its northwesterly boundary line, throughout its length, being identical with the southeasterly side line of the lode claim.

By decision of September 20, 1904, your office directed that the company be called upon to show cause why its entry should not be canceled as to the mill-site, because of the contiguity of such mill-site to one of the lode claims embraced in the entry, and held that in default of such showing and of appeal, the entry would be canceled. The company has appealed here.

The law allowing entry and patent for mill-site claims, is contained in section 2337 of the Revised Statutes, which provides:

Sec. 2337. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

In the case of Alaska Copper Company (32 L. D., 128), this statute was considered, and with respect thereto the Department stated and held as follows (p. 131):

A further and equally fatal objection to the entry, with respect to the mill-site claims, lies in the fact that these claims are contiguous, as a group, to the group of lode claims with which they are claimed. The statute in terms permits only "non-mineral land, not contiguous to the vein or lode," to be appropriated for mill-site purposes, and only "such non-adjacent surface ground" to be embraced and included in an application for patent for the lode claim, and limits the area of "such non-adjacent land" to five acres. These terms are too plain to invite discussion. In this case the lode and mill-site claims form one continuous, uninterrupted group, in manifest contravention of the plain terms of the statute.

The contentions of the appellant are, in substance: (1) that a construction of this statute was not necessary to the decision of the Alaska Copper Company case, and what was said with respect thereto was therefore *obiter* and not binding; (2) that the previous practice of your office had been for years to allow entry and patent for mill-sites contiguous to vein or lode claims, in view whereof and of the rule *stare decisis*, the construction given in that case, even if not

obiter, is wrong and should not be followed; and (3) that such construction, as an original proposition, is contrary to the statute, and therefore erroneous.

1. Whether a number of mill-site claims lying contiguous, as a group, to a group of lode claims could be lawfully included in an entry embracing the lode claims, was one of the questions squarely presented by the record in the Alaska Copper Company case. To pass upon that question it was necessary to construe the statute providing for entry and patent of mill-site claims, and one of the results of such construction is stated in that part of the decision quoted above. The opinion expressed was in no sense an *obiter dictum*, but was a direct departmental adjudication of the question, and was rightfully given force and effect as such, by your office.

2. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which it applies have been previously determined by a tribunal having final jurisdiction of the questions involved. While, perhaps, of doubtful application in any event to a ruling or decision by an executive department of the government construing an act of Congress, for the reason that the Supreme Court is the tribunal of ultimate jurisdiction in such matters, the doctrine has been frequently recognized and applied by this Department in disposing of cases that involved principles established by its own prior decisions of long standing, where such decisions have been uniformly followed.

But such is not the situation here. The appellant has not cited any decision by this Department where the statute in question was construed differently from the construction given in the Alaska Copper Company case, and no such decision has been found, reported or unreported. The doctrine of *stare decisis* can therefore have no application to this case.

3. The contention which assails the correctness of the ruling on this question in the Alaska Copper Company case is, in substance and effect, that there is nothing in the statute to prevent the entry and patent, for mill-site purposes, of land lying contiguous to a vein or lode claim, provided the land be not contiguous to the *vein* or *lode*; that is, that the words "*vein* or *lode*," used in the statute in this connection, must be construed to mean the body of mineral, or mineral-bearing rock, in place, as distinguished from the located claim embracing it; and that only land lying contiguous to such body of mineral, or mineral-bearing rock, may not be patented for mill-site purposes.

It is not believed that this contention can be sustained upon any basis of sound reasoning. To so interpret the statute would be, in the opinion of the Department, to disregard its spirit and plain intent. It is clear from the section read as a whole that the words "*vein* or

lode," in this connection, are not used in the restricted sense of indicating a body of mineral, or mineral bearing rock, in place, only, but are used and intended to be understood in the larger sense, not infrequently applied to them in the mining laws, of designating a located vein or lode *claim*. Further on in the section these same words are unmistakably used in the larger sense here stated, and in such intimate and direct connection with their use in the earlier part of the section as conclusively to show that their earlier use was in the same larger sense. For instance, one of the later provisions of the section is that the mill-site "may be embraced and included in an application for patent for *such vein or lode*, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes;" clearly meaning, by the words "application for patent for *such vein or lode*" the same thing intended to be described by the words "vein or lode" in the earlier part of the section, with respect to which it is provided that the land in the mill-site must be "not contiguous." The portions of the mining laws which provide for obtaining patents to vein or lode claims upon the public mineral lands (Secs. 2325 and 2326 of the Revised Statutes) describes what may be patented thereunder as "a piece of land" which has been "claimed and located" for mining purposes, and as "the claim or claims in common," the boundaries of which "shall be distinctly marked on the ground," etc. As to the dimensions of vein or lode claims it is provided (Sec. 2320) that they "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode" and may extend not to exceed "three hundred feet on each side of the middle of the vein at the surface," etc. Construing section 2337 together with the other sections referred to, all relating to the same general subject, it is clear that the words "vein or lode," several times used in section 2337, are intended to be understood in each instance in the larger sense indicating the *location* or *claim*, rather than in the restricted sense of indicating a body of mineral, or mineralized rock, in place, technically known as a vein or lode.

This view finds support in the decision of the Supreme Court in the recent case of Calhoun Gold Mining Company v. Ajax Gold Mining Company (182 U. S., 499, 505), wherein was involved that part of section 2336 of the Revised Statutes which provides that "where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection." The question was whether in a case of intersecting or cross *veins* located by different parties at different times the provision giving to the prior locator all ore or mineral within the *space* of *intersection* constitutes a limitation upon the provision of section 2322 which gives to

locators of mining claims (where there are no conflicting prior locations) "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges throughout their entire length, the top or apex of which lies inside of such surface lines extended downward vertically." The court held that the provisions of the two sections are not in conflict, thus giving to the word "veins," used in section 2336, the larger meaning of indicating *vein locations* or *vein claims*, rather than indicating bodies of mineral, or mineral bearing rock, in place, technically known as veins or lodes; and to the words "space of intersection," the larger sense of indicating the conflict between the intersecting or cross-locations, rather than indicating the point of intersection of the bodies of mineral, or mineral bearing rock, upon which the locations were based.

There are other considerations which support the view here taken. Under the terms of section 2337 only *non-mineral land* may be embraced in a mill-site. In full, the descriptive terms of the statute are, "non-mineral land not contiguous to the vein or lode," further described as "*such non-adjacent surface ground*," and as "*such non-adjacent land*." Under the mining laws, other than section 2337, only *mineral land* may be lawfully located and patented for mining purposes. The word "adjacent," as generally defined and understood, means lying near, or close, but not actually touching. "Non-adjacent," representing the contrary or opposite situation, means not near, not close. Considering therefore, that land, to be included in a vein or lode location, and patented as such under the mining laws, must be *mineral land*, and that land claimed for mill-site purposes, to be lawfully "included in an application for patent for such vein or lode," must be *non-mineral land*, and that the further descriptive terms of the statute are that the "land" or "surface ground" of the mill-site must be *non adjacent*, that is, not near or close, to the "vein or lode," there would seem to be no room for reasonable question that the words "vein or lode" in the statute, are used in the larger sense hereinbefore indicated, rather than in their strictly technical sense, and that mill-sites, within the meaning of the statute, are intended to be situated some distance from, and in the manner of their location wholly distinct from, the lines of vein or lode locations or claims. What the distance should be is a matter as to which there can be no hard and fast rule, applicable to all cases. The statute should be applied to cases as they arise in such reasonable and just manner as to give effect to its spirit and intent, and so as not to leave narrow strips of the public lands incapable of disposal under any other of the public land laws, a result which it is not to be presumed was within the contemplation of Congress.

It is unnecessary to continue the discussion further. The Department sees no reason to depart from the principle of the construction announced in the Alaska Copper Company case, and the same is adhered to.

In view of the practice which obtained in your office prior to the decision in that case, the Department, on August 17, 1904, in response to your recommendation, directed that in cases of mill-site claims, where the required survey had been made before the date of said decision, and as to which payment and entry under applications for patent were made during the year 1903, the said prior practice, with respect to the question of contiguity of lode and mill-site claims, should govern. Further considering the situation, in the light of the circumstances presented in this case, the Department is of opinion that it would be but just to vein or lode claimants who, before the date of the decision aforesaid, or within such reasonable time thereafter as would be required to give general publicity to that decision throughout the public land states, had or have, in accordance with and in reliance upon the said prior practice of your office, incurred the expense of perfecting their mill-site locations, in a lawful manner in all respects except as to the contiguity thereof to vein or lode claims, should be afforded an opportunity to carry their said locations to entry and patent under the said prior practice, for the reason that otherwise they would, in most cases, if not in all, be compelled to suffer the loss of their entire mill-site claims. Direction is accordingly hereby given that all applications for mill-site patents which may be made and carried to entry before July 1, 1906, or which may, by protest or otherwise, without the fault of the applicant, be prevented from being carried to entry before that date, where the locations of the claims were made and perfected under the law in all other respects prior to January 1, 1904, shall be adjudicated, in respect to the matter of the contiguity of the mill-site claims to vein or lode claims, under the said prior practice of your office. All other cases will be adjudicated in accordance with the ruling in the Alaska Copper Company case, and the principles herein announced.

As the present case falls within this direction, the decision appealed from is modified to allow its adjudication in the manner stated.

MINING CLAIM—MILL SITE—SECTION 2337 OF THE REVISED STATUTES.

HARD CASH AND OTHER MILL SITE CLAIMS.

Section 2337 of the Revised Statutes contemplates that at the time application is made for patent to a mill-site claim the land embraced therein is being used or occupied for mining or milling purposes.

Section 2337 does not contemplate that patent may be obtained for a separate mill site for each of a group of contiguous lode claims held and

worked under a common ownership, and where more than one mill site is applied for in connection with a group of lode claims a sufficient and satisfactory reason therefor must be shown.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 27, 1905.* (G. N. B.)

August 27, 1903, the Giant Ledge Gold and Copper Company made entry for the Hard Cash, Athens, Morning Star, and Miama mill-site claims, survey No. 4110, Independence, California, containing 19.45 acres. It appears that the mill-sites are applied for in connection with four lode mining claims of the same names, situated about a half mile distant. The records of your office show that the four lode claims were included in mineral entry No. 295, made by the said company August 19, 1902, patent upon which was issued May 3, 1904.

May 27, 1904, your office directed the local officers to notify the company that it would be allowed sixty days from notice within which to show cause why the entry for the mill-site claims should not be canceled for the reasons, (1) that there is no evidence in the record to show that they are used or occupied for mining or milling purposes, and (2) that notice was posted on but one of the mill-site claims. It was stated that on failure to make the required showing within the time named the entry would be canceled without further notice.

In response to the requirement respecting the use or occupation of the mill-sites for mining or milling purposes, an affidavit executed by the president of the company, and one executed by the deputy surveyor who surveyed the claims, were filed, in which, taken together, among other things, it is stated, in substance and effect, that the topography of the claims embraced in the entry is such that it is not possible to erect a proper reduction plant on the scale contemplated on a less area than is contained in all of the four mill-sites, but that all four of the mill-sites are required for the buildings and storage necessary, and for the accumulation of water essential for the operation of any works built under plans now formulated, and awaiting only the question of title to the land; that there is no other tract of land than that covered by the mill-site claims suitable to produce the water for a reduction works; that two of the mill-site claims are crossed by a granite dyke which forms a natural submerged dam that can be added to at comparatively small cost, and thereby create a reservoir of great capacity; that wells have been sunk on three of the mill-sites to supply water for storage and milling purposes; and that ore from each lode claim is being stored on the mill-site of corresponding name.

The response to the requirement respecting the posting of notice, is an argument filed by local counsel for the company, in which it is

contended that as a matter of law posting on one only of a number of mill-site claims, included in one application for patent, is sufficient.

November 8, 1904, your office found that the use and occupation of the mill-sites as shown by the affidavits was sufficient to satisfy the requirements of the statute, but held that notice of application for patent must be posted on each mill-site claim, and the entry was therefore held for cancellation, except as to the Miama mill-site.

The company has appealed to the Department.

The first question presented by the record, and which should be first determined, though not directly brought in issue by the appeal, is, whether the use or occupation of the mill-sites for mining or milling purposes, as shown by the affidavits, is such as to satisfy the requirements of the statute.

The portion of section 2337 of the Revised Statutes here applicable is as follows:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode.

The statute clearly contemplates that at the time the application for patent is made the land included in the mill-site claim is used or occupied for mining or milling purposes. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill-site at the time application for patent is filed. (Alaska Copper Company, 32 L. D., 128, 131.) So far as the record in this case shows, aside from the digging of three wells, nothing has been done on the mill-sites. The design to use all of them for the purpose of a reservoir for water, and the building of a reduction works, is not the present active employment of any mining agency upon the land or the direct use of it for milling purposes. Neither is the storing of ore upon each mill-site, under the circumstances of this case, such a use of the land as to warrant the entry and patent of the four mill-sites. It was stated in the Alaska Copper Company case, *supra*, p. 130, that "whilst no fixed rule can well be established, it seems plain that ordinarily one mill-site affords abundant facility for the promotion of mining operations upon a single body of lode claims." It follows that if more than one mill-site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill-sites in this case, where there is nothing to show but that the area embraced in one of them would be

ample for such storage, is but a mere colorable use of the mill-sites, which does not satisfy the requirements of the statute.

It thus appearing that the mill-site claims are not used or occupied for mining or milling purposes in connection with the lode claim as required by law, the entry must be cancelled. This much determined, it becomes unnecessary to pass upon the question of the sufficiency of the posted notice.

The decision of your office is modified to conform to the views herein expressed.

REPAYMENT—PARAGRAPH 13, INSTRUCTIONS OF JANUARY 22, 1901.

WILLIAM B. ARDOUIN.

While paragraph 13 of the instructions governing repayments, approved January 22, 1901, provides that "where there has been a conveyance of the land and the *original purchaser* applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee," any successor of such original purchaser in a line of conveyances is equally within the reason of the rule and should be given the same standing as his grantor.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 28, 1905.* (C. J. G.)

An appeal has been filed by William B. Ardouin, assignee of Charles A. Nichols, from the decision of your office of January 5, 1905, denying his application for repayment of the purchase money paid by said Nichols on cash entry No. 7452 for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, T. 55 N., R. 10 W., Duluth, Minnesota.

The entry was made December 30, 1884, and Nichols deeded the land to Ardouin November 4, 1887, and the latter to John Daly, Henry A. Sampson and William Scott November 11, 1887. The entry was canceled December 21, 1888, "for failure to comply with the law as to residence, such failure being apparent at date of entry," as stated by your office. With his application for repayment Ardouin files a quit-claim deed covering the land in question executed by him to the United States; an affidavit that he has not been indemnified by his grantor, Nichols, for the failure of title, and that title has not been perfected in him by his said grantor or other party through other sources; a certificate of the register of deeds of the county where the land is situated, stating that his records show said land to have been deeded by Nichols to Ardouin and by him to Daly, Sampson and Scott, and that the records do not show any other deed, either of sale

or incumbrance, affecting the title of said parties, between the dates of December 30, 1884, and December 21, 1888; and the following instrument, dated June 14, 1900:

Know all men by these presents, That John Daley, Henry A. Sampson and William Scott parties of the first part in consideration of the sum of two hundred fifty dollars to them in hand paid by William B. Ardouin party of the second part, the receipt of which is hereby acknowledged, have remised, released and forever discharged and by these presents do for themselves their heirs and legal representatives remise, release and forever discharge the said William B. Ardouin, his heirs, executors and administrators from every liability and obligation incurred by reason of any covenants or agreements contained in that certain warranty deed dated November 11th, 1887, made by William B. Ardouin, single, to the said John Daley, Henry A. Sampson and William Scott, purporting to convey the northeast quarter of the northeast quarter of section thirty-three, the northwest quarter of northeast quarter and the north one-half of the northwest quarter of section thirty-four, township fifty-five north of range ten west of the Fourth Principal Meridian, in Lake County, Minnesota, which deed was recorded in the office of the Register of Deeds in and for Lake County, Minnesota, on the 16th day of November, 1887, in book E of deeds on page 172; intending hereby to release the said William B. Ardouin from all liability by reason of any covenants contained in said warranty deed.

This instrument it is claimed meets the requirements of paragraph 13, Instructions Governing Repayments (30 L. D., 430, 434), which provides:

When there has been a conveyance of the land and the original purchaser applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee.

While the instrument presented is open to criticism on the score that it does not in terms waive right to repayment and also does not in terms reconvey the land, it may however be accepted as proof of indemnification by Ardouin of his assignee and as sufficient compliance with the rule in that respect. While the rule mentions only the "original purchaser," any successor of such original purchaser in a line of conveyances is equally within the reason of the rule and should be given the same standing as his grantor. The applicant here having shown that he has indemnified his assignee and that he has not been indemnified by his grantor for the failure of title, has thereby demonstrated his right to receive the money, if it be a proper case for repayment. Your office did not express any opinion on this question.

The decision appealed from is vacated and the papers are returned for further consideration with a view to allowance of the application for repayment if the showing upon the merits bring the case within the statute.

HOMESTEAD ENTRY—QUALIFICATIONS OF ENTRYMAN.

DE WOLF v. MOORE.

In case of a contest against a homestead entry based upon the charge that the entryman is disqualified to make entry by reason of being the owner of 160 acres of land, proof of the technical vesting in the entryman, by devise or operation of law, of a naked legal title that is, or may be, subject to outstanding claims against the estate of the person from whom the title moves, will not, in itself, be held to disqualify the entryman who thus acquires the title, but it must be further shown that the title so acquired is a beneficial one.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 28, 1905.* (E. P.)

William H. DeWolf, heir of Dawn M. DeWolf, deceased, has filed a motion for review of departmental decision rendered May 18, 1905, in the case of Dawn M. DeWolf v. Nellie R. Moore (not reported), modifying your office decision of August 1, 1904, and holding that the evidence submitted at the hearing had in said case was insufficient to sustain the charge that the defendant was disqualified by reason of being the owner of one hundred and sixty acres of land from making entry of the NE. $\frac{1}{4}$ of Sec. 18, T. 2 S., R. 11 W., Lawton land district, Oklahoma, but authorizing a rehearing.

The facts in the case are sufficiently stated in the decision under review, and will not be here repeated except incidentally in passing upon the points raised in the motion.

In the motion it is contended that:

The record shows a complete chain of title from the United States to J. C. Moore for this 320 acres in California. The deed to Moore was executed by one Harry M. Shreve and is to "J. C. Moore of Rockford, County of Floyd, State of Iowa." The record here shows that J. C. Moore, the husband of the defendant, lived at Rockford, Floyd Co., Iowa; his will having been admitted to probate in said county. This alone, in the absence of any evidence to the contrary, would identify the husband of the defendant as the owner of said land.

It appears from the record herein that the defendant's late husband was named John C. Moore, and that in his will, executed June 24, 1896, he described himself as "J. C. Moore, of Rockford, Floyd County, Iowa," but proof that the California land was on February 24, 1888, conveyed to one "J. C. Moore, County of Floyd, State of Iowa," does not raise the presumption that said land was conveyed to the defendant's husband, for the reasons:

(1) The fact that the family name and initials are the same raises no presumption that the parties are the same. (*Louden v. Walpole*, 1 Ind., 321; *Bennett v. Libhart*, 27 Mich., 489; *Lidden v. Hodnett*, 22 Fla., 442; *Andrews v. Wynn*, 4 S. D., 40, 54 N. W. Rep., 1047; *Gardiner v. McClure*, 6 Minn., 167, 176.)

(2) From proof of the fact that the defendant's husband was domiciled at Rockford, Floyd County, Iowa, in 1896, it cannot be presumed that he lived at that place in 1888. Presumptions are not retrospective. The law never raises from the proof of the existence of a present condition or state of independent facts any presumption that the same condition of facts existed at a prior date. (*Windhaus v. Bootz*, 92 Cal., 617; *State v. Hubbard*, 60 Iowa, 466; *Blank v. Livonia Township*, 79 Mich., 1.)

Counsel in his brief sets forth the following testimony given by the defendant:

Q. What do you know about the land referred to in the testimony for the contestant as being situated in California?—A. I don't know but very little about it. There has never been anything done about it.

Q. Has it ever been divided between the heirs?—A. No sir.

Q. Any steps been taken to administer upon that part of the estate?—A. No sir.

and says—

There is an express admission by the defendant that the California land was a part of her husband's estate. Reference in the first question is made expressly to the land referred to in the testimony for the contestant as being in California. The land so referred to is the 320 acres above described. If Mrs. Moore was not the owner of one-third of that land she had the best opportunity in the world to so state in this part of her testimony.

The testimony above set forth is the only testimony in the case relied upon to show that the defendant's husband ever had title to the said tract of land in California. This testimony contains no admission; it is merely a statement of want of knowledge, and the Department would not be justified, in view of its indefiniteness, in assuming or deducing therefrom anything more than ignorance of the matters inquired about, particularly in view of the fact that no effort whatever was made by the contestant, by way of cross-examination, to elicit further information on this point, the only question asked the defendant on cross-examination being one relating exclusively to the land in Iowa set apart to her.

Moreover, the defendant testified at the hearing that she had not, since the death of her husband, owned in her own right, any land except that set apart to her in Iowa, as hereinbefore stated, and the tract involved herein. In view of this testimony, the Department is of opinion that, if it were proved, as contended by the contestant, that the defendant's husband died seized of the California land referred to, there was cast upon the contestant the burden of proving that the defendant took a beneficial interest in said California land, that is to say, something more than a mere naked legal title thereto that might, so far as is disclosed by the record herein, be wholly defeated by the assertion of claims against her husband's estate having priority over hers. No such showing was made on behalf

of the contestant. The Department does not believe that proof of the technical vesting in an entryman by devise or by operation of law of a naked legal title that is, or may be, subject to outstanding claims against the estate of the person from whom the title moves, should, upon a contest, be held to disqualify the entryman who thus acquires the title, but that it should be further shown that the title so acquired was a beneficial one. In short, in order to work a forfeiture of this valuable right of entry, there should be some proof of the alleged disqualification; not mere theories, surmises or probabilities with no support other than inference dubiously drawn from a fragment of the testimony.

It is asserted in the brief filed in support of the motion that the land in Iowa (122½ acres) set apart to the defendant as her share of her husband's real property situated in Iowa, passed to her under the terms of her husband's will, and it is urged that this, together with the established facts that Moore's estate in Iowa had been fully administered by the defendant and that the records disclosed no mortgage upon the California land, must be accepted as proof that all of Moore's debts had been satisfied and that the undivided one third interest in the California land which it is claimed vested in the defendant by the terms of her husband's will was thus shown to be free from any claim superior to her own.

The answer to this contention is:

(1) Pursuant to the defendant's application the said land in Iowa was set apart to her, not under the terms of her husband's will, but under the law, which provides (Sec. 2366, Title XVII, ch. 4, Code of Iowa, 1897), that—

One third in value of the legal and equitable estates in real property possessed by the husband at any time during marriage, which have not been sold on execution or other judicial sale and to which the wife had made no relinquishment of her right, shall be set apart to her in fee simple if she survives him.

And it is held that this right of the widow, called by the courts of Iowa her "dower" right, is not subject to the debts of the husband, as is the interest of an heir. (*Mock v. Watson*, 41 Iowa, 241; *Kendall v. Kendall*, 42 Id., 464.)

(2) The defendant's power as administratrix of her husband's estate did not extend beyond the limits of the State of Iowa. Therefore the administration of such portion of her husband's estate as was situated in Iowa had no effect on any portion of such estate as may have been situated in California. It is therefore held that if the defendant's husband died seized of said California land, the record herein fails to show that any portion thereof passed to the defendant free from any prior claim thereto.

The motion for review presents no reason sufficient to warrant the Department in modifying its previous decision, and none otherwise appearing, the same is accordingly denied.

SOLDIERS' ADDITIONAL ENTRY—SECTIONS 2306 AND 2307, R. S.

JOHN C. MULLERY ET AL.

In every case where the soldier rendered the requisite military service and made homestead entry for less than one hundred and sixty acres prior to the adoption of the Revised Statutes, the proper foundation exists for an additional entry under the provisions of sections 2306 and 2307 of the Revised Statutes, notwithstanding the soldier may have died prior to the enactment of said legislation.

Where a soldier qualified to make additional entry under the provisions of section 2306 of the Revised Statutes dies without having exercised or disposed of such right, his widow is, in the first instance, entitled thereto, by virtue of the provisions of section 2307, but if she remarry or die without having exercised or disposed of the right, his minor orphan children become entitled thereto; and if not exercised or disposed of by them, through a guardian, during their minority, the right remains an asset of the soldier's estate.

Sections 2306 and 2307 of the Revised Statutes do not contemplate more than one additional right of entry, founded upon one and the same military service; and the existence of a valid additional right based upon a homestead entry made by the soldier, precludes an independent additional right to his widow, or after her death to the heirs of her estate, based upon a homestead entry made by her.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 29, 1905.* (P. E. W.)

The Department has before it the appeal of John C. Mullery from your office decision of October 19, 1904, holding for rejection his application, as assignee of the heirs of Harriet James, to make soldiers' additional homestead entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 35, T. 54 N., R. 10 W., Duluth, Minnesota, based on the military service of John James and the homestead entry, No. 8182, of said Harriet James, made on February 28, 1872, for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 32, T. 6 N., R. 26 W., Dardanelle, Arkansas.

It appears that the said John James who rendered the requisite military service, made a homestead entry, No. 694, on February 10, 1868, for the SW. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 22, T. 6 N., R. 26 W., Clarksville, Arkansas; that he died "in March, 1868" leaving a widow, the said Harriet James, and two minor children, Frank and Neely James; that said Harriet James made said homestead entry, No. 8182, as the head of a family, for her own exclusive use and benefit, never made any other entry or disposed of any right to enter land, remained single, and died in July, 1887; and

that on August 17, 1901, the said Frank and Neely James, the sole surviving children of said John and Harriet James, executed and delivered to one William L. Taylor two certain assignments, each of which purported to convey to him a soldiers' additional homestead right for eighty acres of land.

In one of these instruments the said Frank and Neely James, as sole heirs of John James, deceased, sold and assigned to said Taylor such an alleged right, based upon the military service of said John James and said homestead entry No. 694, made by him. In the other, they, as sole heirs of Harriet James, sold and assigned to said Taylor such an alleged right based upon the military service of said John James and the homestead entry No. 8182, made by said Harriet James.

The former alleged right passed by due assignment into the hands of John O. Hanchett and the latter into the hands of said John C. Mullery. Both Hanchett and Mullery applied to locate their said alleged rights, and on December 11, 1903, your office rejected Mullery's application on the ground that the said homestead entry, No. 8182, made by Harriet James, did not constitute a proper basis for an additional homestead right. Mullery appealed to the Department.

January 7, 1904, your office held, on Hanchett's said application, that all necessary proof had been furnished, but suspended further action thereon to await the final disposition of Mullery's application.

The Department, on May 11, 1904, decided that, owing to the bearing of said two cases upon each other, they should be considered together; vacated your said office decision of December 11, 1903, in Mullery's case, and remanded the same with instructions to reconsider both cases, upon full argument by both parties, and then render decisions in both cases, passing upon the following questions:

Is either of said rights of additional entry valid? Are they both valid? If only one of them is valid, which one is the valid one?

Thereupon your office rendered the decision from which this appeal is taken, in which Mullery's application is rejected and Hanchett's application is allowed, upon the ground that—

the assignment of said Frank James and Neely James, as heirs of Harriet James, and based on homestead entry No. 8182 of said Harriet James, does not constitute a proper legal basis for the additional right claimed by Mr. John C. Mullery, for the reason that the additional right of entry predicated on the military service of John James is properly based on the homestead entry, No. 694, of said John James and passed by assignment for value from said heirs of John James to said John O. Hanchett, and thereafter they had no right remaining in them.

In general, the questions presented by this appeal and the answer thereto, are the same as those above stated which were propounded in the former departmental opinion. But on behalf of the appellant the

specific inquiry is now urged, whether, in view of the fact that the soldier, John James, died prior to the enactment of any of the legislation conferring special privileges upon soldiers and their widows and orphans in the matter of homestead entries and residence on the land entered, any soldiers' additional right ever existed in favor of the estate or the heirs of said John James other than that which is expressly provided in said legislation for his widow and his minor children.

This question involves the history, the intent and the proper construction of the legislation relating to soldiers' homestead, and additional homestead, rights.

The first act of Congress in respect thereto was that of April 4, 1872 (17 Stat., 49), which was amended by the act of June 8, 1872 (17 Stat., 333), and again amended by the act of March 3, 1873 (17 Stat., 605), all of which legislation was subsequently carried into the Revised Statutes of the United States, approved June 22, 1874, appearing in sections 2304, 2305, 2306 and 2307.

Section 2304 provides that:

Every private soldier and officer who has served for ninety days shall, on compliance with the provisions of this chapter as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

Section 2305 provides that the period of the military service rendered shall be deducted from the required term of residence on the land.

Section 2306 provides that:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered shall not exceed one hundred and sixty acres.

Section 2307 provides that:

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian, shall be entitled to all the benefits enumerated in this chapter; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

That the said additional homestead right was created in the case of each soldier who rendered the requisite military service "during the recent rebellion" and made the previous entry of less than one hundred and sixty acres of land, regardless of whether he died before or after the enactment of said legislation, clearly appears from the closing lines of said section 2307, in which a soldier who "died during his term of enlistment" is distinctly included in the category of such per-

sons as would have been "entitled to a homestead under the provisions of section two thousand three hundred and four," and consequently to an additional homestead under section 2306:

The same construction, purpose and effect was given to said legislation at the time of its enactment and in the discussion thereon in the United States Senate, when the passage of said act of June 8, 1872, *supra*, was under consideration (see the case of Anna Bowes, 32 L. D., 331, 337), the particular question being the construction of the words in section 3 of said act, now said section 2307, *supra*:

In case of the death of any person who would be entitled, etc.

Mr. Morton.

The explanation of the Senator from Kansas I think is not satisfactory. He makes this section to apply to any person who, after having made his location should then die, but that is utterly inconsistent with the proviso in the same section, "provided that if such person died during the term of enlistment," showing that it applied to those who even died during the war and before the passage of this bill. Therefore it does not refer to those who may make location after the passage of this bill or at any time subsequent to the war, and shows that it refers to soldiers without reference to the time when they died.

That this view prevailed may be argued from the fact that the said proviso was retained as a portion of said section 2307.

It is clear, therefore, that under and by virtue of the said legislation there was created an additional homestead right in the case of said John James, who survived the requisite military service and made a previous entry of less than one hundred and sixty acres of land, but died before the enactment of said legislation. Predicated upon his said service and entry, it sprang into existence upon the passage of the law.

Once existing, the said right continues until used, forfeited or extinguished by some process known to the law.

Of the nature of this right and the intent and purpose of the legislation granting the same, the Supreme Court of the United States, in the case of *Webster v. Luther* (163 U. S., 331, 340), said:

It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry.

The court further quoted with approval the language of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Barnes v. Poirier* (27 U. S. App., 500):

It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee.

The contingency of the death of the soldier whose services had earned such compensatory gift and property right, whether during enlistment, or prior to the enactment of said legislation, or subsequently thereto without having used the said additional right, is

recognized and provided for in the said section 2307, which necessarily includes section 2306 with section 2304.

Under said section the said Harriet James became "entitled to all the benefits enumerated in this chapter" as the widow of said John James and not otherwise, thus recognizing and emphasizing the compensatory and existing property right as earned by the soldier, and extended to other persons only as they stood near to and represented him. This harmonizes with the line of succession established in section 2291 of the Revised Statutes of the United States in the matter of perfecting title to land embraced in the entry of a deceased homestead claimant. Therein the widow is given the first right to perfect the claim but in case of her death it accrues to "his heirs or devisee." So by said section 2307 the widow is, in the first instance, entitled to appropriate the additional right based on the homestead entry of the soldier, but if she remarries or dies without having exercised or disposed of the same, it remains a part of the soldier's estate subject to appropriation by "his minor orphan children." In the present case, therefore, it is clear that upon the death of the widow of John James without exercising or disposing of the additional right based on his military service and his homestead entry, such right did not become a part of her estate.

Not having been exercised or disposed of by his orphan children, during their minority, through a guardian, the estate of the soldier was not divested of said right. See the case of Allen Laughlin (31 L. D., 256), wherein it is said that such right can be legally assigned only by the personal representative of the deceased soldier.

In the present case the assignment by Frank and Neely James, as heirs of John James, is accompanied by probate evidence that the personal representative of said John James waived his right to sell, and obtained the approval, by proper order of court, of the sale made by said heirs under which Hanchett claims herein. The present case is therefore not in conflict with the rule in the case last cited.

But it is contended by appellant that:

the right which would have inured to the soldier if he had lived until after the date of said act, by the express terms of section 2307 was granted to his widow.

In support of this contention the case of the Sierra Lumber Company (31 L. D., 349) is cited.

In that case the soldier had not made a previous entry for less than one hundred and sixty acres, which in said legislation is the basis for the additional right, and the whole right under the statute devolved first upon the widow as the "person entitled to all the benefits enumerated in this act." The widow having made a previous entry of eighty acres, as a corollary the additional right was hers.

So in the case of Homer E. Brayton (31 L. D., 443), where the

deceased soldier had made no homestead entry, it was held that an additional right arises under said section to the widow who has made a previous entry of less than 160 acres.

The Department said:

The additional right conferred by sections 2306 and 2307 may be either for the soldier or his widow, and the circumstances of the case will control. If the soldier made the original entry, the additional right is his, but if the original entry was made by the widow, the additional right is hers.

In that case there were no children, and the widow having died without exercising the right, it was held that the right became an asset of her estate, not subject to the control of the administrator of the soldier's estate. Again, in the unreported case of *E. J. McLaughlin*, dated July 25, 1902, cited by appellants, the soldier died in service and had made no previous entry. The soldier's widow made a homestead entry for eighty acres prior to the enactment of the legislation here in question but did not exercise or dispose of any additional right of entry. There were no minor children of the soldier.

The Department said:

The children took nothing by virtue of said section 2307, and if they are entitled to this property right, it is because of their being the heirs of their mother and not because of any provision of said section.

But in no case has it been held, directly or by necessary implication, that where the soldier made the previous entry of less than one hundred and sixty acres, an additional entry right accrued to the widow otherwise than by virtue of said section 2307, which passed it to the soldier's minor orphan children in case she remarried or died without using or disposing of the right. Where the soldier made no original entry which would serve as a basis, no additional right ever existed which could inure to him, even if he lived until after the enactment of said legislation, and where the soldier had made an original entry, thereby providing the necessary basis, the additional right sprang into existence upon the enactment of said legislation, even though he had previously died, and inured under section 2307 in succession to his widow, while living and single, to his orphan children during their minority, and then, if still unused, to his estate. In the former case the widow of the soldier could, upon the basis of an original entry, made by herself, so long as she remained unmarried (see *John S. Maginnis*, 32 L. D., 14), assert an independent additional right, and if she died without exercising or disposing of the same, such right became and remained a part of her estate. The existence of a valid additional right based upon a homestead entry made by the soldier, precludes the arising of such an independent additional right to his widow, or after her death to the heirs of her estate, based upon a homestead entry by her.

There can not, in any event, be two such additional rights. No indication can be found, in the purpose or history of the said legislation, or in the discussion thereon, that more than one additional right, based upon one and the same military service, was ever contemplated. Neither does the construction since placed thereon by the Department and the courts warrant or admit of the conclusion asked herein that a second additional right accrues to the widow of a soldier and to her separate estate, in case she, as well as the soldier, has made a previous entry.

The conclusion is inevitable that on August 17, 1901, the said Frank and Neely James had no valid additional right as heirs of Harriet James, and John C. Mullery took nothing under their assignment to Taylor as such heirs.

As heirs of John James, the said Frank and Neely James had a valid additional right, which by due assignment became the property of John O. Hanchett, and affords a proper and sufficient basis for his said application, which will accordingly be allowed.

Your said decision is hereby affirmed.

SOLDIERS' ADDITIONAL ENTRY—SECTIONS 2306 AND 2307, R. S.

ARCH V. ALEXANDER.

Sections 2306 and 2307 of the Revised Statutes do not contemplate more than one additional right of entry, founded upon one and the same military service. Location having been allowed of a portion of an additional right based upon a homestead entry made by the widow of a soldier, and recertification made for the remainder of the right, it is held, upon application being made for the allowance of a further additional right based upon an entry made by the soldier himself, that no foundation therefor exists, the additional right allowed on the homestead entry of the widow being considered as having been based upon the homestead entry of the soldier.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 29, 1905.* (P. E. W.)

The Department has before it the appeal of Arch V. Alexander from your office decision of October 26, 1904, rejecting his application, as assignee of G. W. Stone, administrator of the estate of William M. Lantz, to enter, under sections 2306 and 2307 of the Revised Statutes of the United States, the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 5 S., R. 24 W., Camden, Arkansas.

The application is based on the military service of said William M. Lantz and the homestead entry, No. 639, made by him on March 19, 1867, for the W. frl. $\frac{1}{2}$ NW. frl. $\frac{1}{4}$, Sec. 2, T. 20 N., R. 16 W., Little Rock, Arkansas, containing 51.24 acres.

Rejection was upon the ground that the soldier's additional right based on the military service of said Lantz had previously been fully exhausted and therefore the assignment herein does not constitute a proper legal basis for the right claimed by this applicant, it appearing from your office records that on October 13, 1883, your office issued certificate of right for 121.78 acres to said George W. Stone, guardian of G. N. Lantz, Lucinda Lantz and William Lantz, minor orphan children of the soldier, and that under date of January 26, 1884, 120 acres of said right was located on the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 2 S., R. 4 W., Las Cruces, New Mexico Territory, for the said minor orphan children, and the unused portion of said certificate, 1.78 acres, was recertified to one John H. Howell on December 10, 1901, but does not appear to have been located.

It further appears from your office records that under date of February 23, 1872, Julia A. Lantz, the widow of the soldier, made homestead entry, No. 5547, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, T. 20 N., R. 15 W., Harrison, Arkansas, containing 38.22 acres, for which patent issued on final certificate 3755, on August 13, 1883, to the said minor children of the soldier, by said George W. Stone, their guardian.

The contentions of this appeal are that the said additional right, located on January 26, 1884, was based on said homestead entry of Julia A. Lantz, the widow, and not on that of the soldier, William M. Lantz; that the heirs of the soldier are entitled to such an additional right, based on the homestead entry of the soldier, notwithstanding the fact that they have received the benefit or an additional right based on the homestead entry of their mother, the widow of the soldier; and that if but one additional right is allowed, that based upon the soldier's homestead entry should take precedence over that based upon his widow's homestead entry; and that no reason exists why the same army service may not serve as a basis for such an additional right to both the soldier's and the widow's homestead entries.

The questions whether there may be two such rights based on the same military service, and, if but one is allowed, whether that based on the soldier's homestead entry or that based on his widow's homestead entry, is to be allowed, were before the Department in the case of John C. Mullery, assignee of heirs of Harriet James, and John O. Hanchett, assignee of heirs of John James, this day decided.

Upon careful review and comparison of previous like cases, and full consideration of the legislation in question, the Department said:

The existence of a valid additional right based upon a homestead entry made by the soldier, precludes the arising of such an independent additional right to his widow, . . . based upon a homestead entry by her. There cannot in any event be two such additional rights.

Since there was no other valid basis therefor, it follows that the said additional right, located January 26, 1884, of which the minor orphan children of the soldier have received the benefit, together with the said recertified portion which has not been located, was based upon the homestead entry of the soldier, and such location and recertification exhausted the additional right based on the military service of the soldier William Lantz.

The present application will be rejected, your said decision being hereby affirmed.

SOLDIERS' ADDITIONAL ENTRY—WIDOW—SECTIONS 2306 AND 2307, R. S.

INKERMAN HELMER,

The additional right accruing to the widow of a soldier, under sections 2306 and 2307 of the Revised Statutes, by reason of an entry for less than one hundred and sixty acres made by herself, is a property right vested in her, and is not forfeited by her remarriage or death; but in case of her remarriage is held in abeyance during coverture, and in event of her death remains an asset of her estate.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 29, 1905.* (P. E. W.)

Counsel for Inkerman Helmer has filed a motion for review of departmental decision of July 8, 1905 (not reported), affirming your office decision of November 18, 1904, in which you rejected his application, as assignee of J. J. Foster, administrator of the estate of Lewis W. Matthews, deceased, and of Sarah Ann Morris, formerly the widow of said Matthews, to enter, under section 2306 of the Revised Statutes of the United States, the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 14, T. 32 S., R. 17 E., Lakeview, Oregon.

The application is based on the military service of said Lewis W. Matthews, and the homestead entry, No. 501, made by his widow on January 29, 1868, for eighty acres of land in the Clarksville, Arkansas, land district. The grounds for rejection, as stated in your said decision, are that the widow's said entry does not constitute a legal basis for the additional right claimed herein because she had remarried prior to her assignment thereof to this applicant, and that the assignment by the administrator of the soldier's estate is without effect for the reason that whatever additional right existed belonged to the widow.

It appearing that the soldier had not made a homestead entry for less than one hundred and sixty acres, the right to make an additional entry never existed in him or in his estate. His widow having made a homestead entry for eighty acres before her remarriage, and prior

to the enactment of the legislation under consideration, the said legislation bestowed upon her, as an absolute gift, the right to make an additional entry of eighty acres, and this right she could exercise in person or assign to others. See the cases of *Sierra Lumber Company* (31 L. D., 349), and *Homer E. Brayton* (31 L. D., 443).

The sole question to be considered upon this motion is whether her said right of additional entry, compensatory for the failure to obtain full one hundred and sixty acres under her said homestead entry, was forfeited and extinguished by operation of law when she remarried on April 21, 1889, without having previously used or disposed of the same.

In the similar case of *John S. Maginnis*, (32 L. D., 14), the Department said:

Section 2307 of the Revised Statutes allows the widow of a deceased soldier, who would have been entitled to the benefits of section 2304, all the benefits enumerated in that chapter, the right of additional entry being one of the benefits, but this is allowed her on the express condition that she be unmarried.

In the case at bar the widow was entitled to an additional right of entry so long as she remained unmarried, but having failed to exercise the right during her widowhood, it could not be asserted by her during coverture.

Where, as in the present case, the additional right is earned by the widow through her own previous homestead entry of less than one hundred and sixty acres, and does not come to her through the soldier, it is a property right vested in her and there is no forfeiture of such right either by her remarriage or by her death, without having exercised or disposed of the same. The law granting the right does not prescribe a forfeiture and none will be presumed. But the law does declare against the exercise of the right during coverture, and, as in the last case cited, it must be held to be in abeyance until the disability of coverture ceases to exist or her death occurs. In the latter event, it remains a part of her estate.

As the record herein fails to show that such disability has been removed, the said right could not be assigned and asserted as is herein sought to be done, and for that reason the motion for a review cannot be entertained. The motion is accordingly hereby overruled.

SOLDIERS' ADDITIONAL ENTRY—WIDOW—SECTIONS 2306 AND 2307, R. S.

JOHN M. MAHER.

The additional right of entry accruing to the widow of a soldier under the provisions of sections 2306 and 2307 of the Revised Statutes, based upon an entry made by herself, is not lost, forfeited or extinguished by her remarriage, but is merely held in abeyance during coverture, and upon removal of such disability may be exercised or disposed of by her as though she had remained the soldier's widow.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 29, 1905.* (P. E. W.)

The Department has before it an appeal of John M. Maher from your office decision of April 21, 1905, rejecting his application, as assignee of Rebecca M. Day, widow, former widow of Isaac V. Herriford, to enter under sections 2306 and 2307 of the Revised Statutes of the United States, the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 159 N., R. 69 W., Devils Lake, North Dakota.

The application is based on the military service of said Isaac V. Herriford and the homestead entry, No. 5238, of his said widow, now Rebecca M. Day, made on February 6, 1868, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 9, T. 64, R. 24, Boonville, Missouri.

It appears that the soldier died in service and that his widow had not remarried when she made her said homestead entry and when the legislation in question herein was enacted, but subsequently, on December 11, 1883, without having used or disposed of any additional right, she was married to one Leroy Day. The latter died prior to the assignment under consideration and at date thereof she had not remarried.

Your said decision concedes that—

During her widowhood as the widow of Isaac V. Herriford, said Rebecca M. Herriford possessed the additional right to enter in person, or assign, 120 acres.

The single question presented by this appeal, therefore, is whether by her remarriage the said right was lost, forfeited or extinguished.

As decisive of this point you cite in the decision appealed from the unreported departmental decision of June 29, 1904, which formally affirmed your office decisions of April 4, 1903, and March 21, 1904, in the case of Robert E. Sloan, assignee of Sarah N. E. Prewitt, widow, former widow of William Prewitt, wherein it was held that "by remarrying she forfeited all such right."

Upon motion for review of its said decision of June 29, 1904, the Department in its unreported decision of November 22, 1904, said:

Upon further and more mature consideration of the questions involved in this case, this Department is of the opinion that Mrs. Prewitt never became vested with a right of additional entry.

Said statute confers the right upon the widow upon the express condition *that she be unmarried*. At the time of its passage, Mrs. Prewitt was not unmarried. . . . Therefore she never became seized of an additional right of entry, and hence she conveyed no such right by her assignment. For this reason the motion for review is denied.

The said case therefore differs and must be distinguished from the present case on the vital point on which the Department based its denial of a review, for herein it is conceded that, being at the time unmarried, the widow of the soldier became seized of such additional

right by and upon the enactment of the legislation which conferred it. Further inquiry into its precise nature and extent is necessary to determine whether this right, once existing and never used, was forfeited and extinguished by operation of said law, when the widow contracted a second marriage.

The proper distinction is to be drawn between an additional right which is based on a homestead entry made by the soldier and one based on a homestead entry made by his widow. In the former case the right is earned by the soldier and is extended by the legislation in question to other persons only as they stood near to and represent him, passing in the first instance to his widow. But if she remarries or dies without having exercised or disposed of the same, it goes to his minor orphan children, if any. If he has no minor children, or if the right is not exercised or disposed of during their minority, it reverts to his estate. Where, by reason of the widow's remarriage the right has passed to the soldier's minor orphan children or has reverted to his estate, it is at an end so far as the widow, as such, is concerned.

In the latter case, however, where the soldier had made no homestead entry and the right is based on a homestead entry made by the widow after his death, a very different condition is presented. Here the additional right is earned by the widow and is vested in her in the first instance. Two requirements only are stated in the legislation conferring such right and regulating its use, namely, that at date of the enactment of said legislation and at date of the use or disposal of the right she be unmarried, and that prior to the enactment of said legislation she shall have made a homestead entry of less than 160 acres, whereby her own independent homestead right has been exhausted. Where these requirements are met, as in the present case, the right of additional entry vested in the widow and was as absolute, complete and unfettered a right as that of the soldier himself in the former supposed case. This view is in harmony with the decisions of the courts and the Department. Thus in the case of Homer E. Brayton (31 L. D., 443, 444), the Department, after a comparison of previous like cases, and in harmony with them, said:

The additional right conferred by sections 2306 and 2307 may be either for the soldier or his widow, and the circumstances of the case will control. If the soldier made the original entry, the additional right is his, but if the original entry was made by the widow, the additional right is hers. Upon her failure to exercise it during her life, it becomes an asset of her estate, and as such is not subject to the control of the administrator of the soldier's estate.

If her death can not terminate such right when it has once vested in the widow, neither can remarriage. Nowhere in the legislation under consideration is there a provision, express or implied, for the termination of such right, except where it was earned by the soldier,

vested in him and his estate, and extended to his widow by said section 2307 during her life and widowhood only. Where the soldier never possessed the right, and it was earned by the widow and vested in her in the first instance, she took such right to the exclusion of the soldier's heirs or estate and free from any condition that she remain his widow. In the language of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Barnes v. Poirier* (27 U. S. App., 500) :

It was an unfettered gift It vested a property right in the donee.

This language, defining the purpose, nature and extent of the right in question, was quoted with approval by the Supreme Court of the United States in the case of *Webster v. Luther* (163 U. S., 331, 340), and it was there said :

It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry.

Such unfettered, compensatory gift and property right vested in the widow on the basis of her own previous homestead entry and not upon the homestead entry made by the soldier, is not terminated by her remarriage, although, as held by the Department in the case of *John S. Maginnis* (32 L. D., 14), if she fails to exercise or dispose of it before she remarries, she cannot assert the right during coverture.

It should be observed that in the last-mentioned case the syllabus, in the second paragraph, was inadvertently made to state that the additional right in such case was lost by remarriage, while in the opinion it is held that the right is held in abeyance during coverture, and that in the language of said section 2307, she must be unmarried at the time she uses or disposes of the right.

If no other valid objection appears, the application will be allowed, your said decision being hereby reversed.

SOLDIERS' ADDITIONAL ENTRY—WIDOW—SECTIONS 2306 AND 2307, R. S.

CHARLES W. BURDICK.

In case a soldier's widow entitled to make additional entry under sections 2306 and 2307 of the Revised Statutes, by virtue of an entry for less than one hundred and sixty acres made by herself, remarries, without having exercised or disposed of such right, it can not be asserted during coverture; nor can the fact that the only child of the soldier joined the widow in an assignment of such right in any wise affect the situation, in view of the fact that the right is based upon an entry made by the widow and not by the soldier.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, December 29, 1905.* (P. E. W.)

Charles W. Burdick has filed a motion for review of departmental decision of March 9, 1905 (not reported), formally affirming your office decision of October 29, 1904, wherein you overruled his motion for review and adhered to the previous action of your office rejecting his application, as assignee of Lorinda Cross, formerly the widow of David McManus, to enter, under section 2306 of the Revised Statutes of the United States, the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 9, T. 16 N., R. 78 W., Cheyenne, Wyoming.

The grounds assigned for the motion are that the said decision is contrary to the law and the evidence. The application in question was based upon the military service of David McManus and the homestead entry, No. 6061, made by his widow, now Lorinda Cross, on December 2, 1868, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 38 N., R. 13 W., Boonville, Missouri.

It appears that the soldier died on or about the 29th day of February, 1864, and had not made a homestead entry, that he left only one child, Margaret E. McManus, now Cross; and that his widow, the said Lorinda Cross, had not remarried when she made her said homestead entry, No. 6061, but has since remarried. The record does not disclose the date of her remarriage or whether she was again a widow at date of the assignment in question, but it does appear that she had not used or disposed of any such additional right when she contracted her second marriage.

The application herein is dated June 14, 1902, and recites only the assignment to the applicant of the additional right of the said widow, Lorinda Cross, although it is accompanied by a joint assignment executed by the widow and the daughter of the soldier.

Rejection was upon the ground:

That the original entry alleged does not constitute a proper legal basis for the right claimed by the applicant, for the following reason: the claimant having remarried before exercising the right, she cannot assert it during coverture. Maginnis, assignee of Rose (32 L. D., 14). A daughter of claimant by her first marriage joined in the assignment, but she is not named in the application. There is also evidence in the form of affidavits tending to prove her to be the soldier's only child. If claimant is again a widow, it does not so appear.

As it does not appear that the disability of coverture has been removed, this case is controlled by the decision in the case of John S. Maginnis (32 L. D., 14).

The alternative contention that the assignment of the additional right herein by the only child of the soldier is valid and effective because, by joining therein, the widow of the soldier waived every possible conflicting claim, cannot be sustained, for the reason that no

additional right ever arose for the soldier, his child or estate, he never having made the homestead entry which is essential as a base for such right. The motion for review is denied.

FORT BUFORD ABANDONED MILITARY RESERVATION—RECLAMATION ACT.

OPINION.

Lands formerly within the Fort Buford military reservation were by the act of May 19, 1900, restored to the public domain and made subject to existing laws relating to disposal of the public lands, except such laws as are not specifically named therein, and are subject to withdrawal under the reclamation act as other portions of the public domain subject to entry under the general land laws; and a withdrawal of such lands for reclamation purposes is effective as to all of the lands for which entry was not made within three months from the filing of the township plat, and prior to the withdrawal.

Assistant Attorney-General Campbell to the Secretary of the Interior,
December 29, 1905. (E. F. B.)

I am in receipt by reference for opinion of a letter from the Director of the Geological Survey requesting to be advised whether the withdrawal made August 24, 1903, under the act of June 17, 1902 (32 Stat., 388), of lands within the former Fort Buford military reservation and within the irrigable area of the Lower Yellowstone project, will be effective as to entries of such lands made subsequent to said withdrawal, and after three months from the filing of the township plat, and whether such entries are subject to limitations and restrictions of the reclamation act.

The lands in this reservation, which has been abandoned, are not subject to disposal under the act providing for the disposal of abandoned military reservations, but were restored to the public domain by the act of May 19, 1900 (31 Stat., 180), which provides that they shall be subject to disposal under the homestead, townsite, and desert-land laws, with the proviso that actual occupants thereon upon the first day of January, 1900, shall have a preference right to make one entry not exceeding one quarter section; that lands occupied for town-site purposes, and lands shown to be valuable for coal or minerals, shall be subject to entry and sale under the "townsite, coal, or mineral-land laws, respectively."

The practical effect of the act was to restore the land to entry under existing laws except such laws as are not specifically named. It is therefore subject to withdrawal under the reclamation act as other portions of the public domain which are subject to entry under the general land laws.

Hence, where such lands have not been entered within three months from the filing of the township plats in the local office and prior to the withdrawal of the lands for reclamation purposes, the withdrawal will be effective, as all such lands and entries thereof will be subject to the limitations and restrictions of the reclamation act.

Approved:

THOS. RYAN,

Acting Secretary.

HOMESTEAD ENTRY—RESIDENCE—DURESS.

CANNON v. JOHANSON.

A homestead entryman is entitled to the exclusive possession and enjoyment of the land embraced in his entry, and where he in good faith builds a house upon the land with a view to establishing residence and complying with the law, but is prevented by the threats of a rival claimant from establishing residence upon the particular portion of the land selected by him for that purpose, it is not incumbent upon him to establish his residence upon another portion of the land, and he will not be held in default for failure to do so.

Secretary Hitchcock to the Commisisoner of the General Land Office,
(F. L. C.) *November 24, 1905.* (E. O. P.)

August W. Johanson has appealed to the Department from your office decision of April 13, 1905, affirming that of the local officers holding for cancellation his homestead entry for lots 1, 2, 3, 4 and 5, Sec. 5, and lot 1 of Sec. 6, T. 15 S., R. 8 E., San Francisco, California, upon the contest initiated by James Cannon, charging abandonment and failure to cultivate and improve the land as required by law.

A very careful examination of the entire record discloses, briefly stated, the following material facts. The entry in question was made August 7, 1897. At that time said lot 5 was enclosed by Cannon's fence and he was asserting a possessory claim to and a right of entry for the tract. Within a month after making his entry, Johanson hauled lumber to and began the erection of a house upon the disputed tract. Before the house was completed Cannon destroyed the same and removed the lumber but notified claimant of its location and that he would be permitted to reclaim it but ordered him not to attempt to rebuild. Prior to filing on the land, claimant was informed by Cannon of his claim thereto and that he proposed to file thereon and that claimant and all others would be prevented from obtaining the land, even though it became necessary for him to carry his dire threats into execution. In February, 1898, Johanson again went upon the land and, with the assistance of others, built a dugout, in which he placed a few personal effects, and slept therein one night.

The destruction of the dugout at the hands of Cannon shortly followed. No further effort appears to have been made on the part of claimant to establish his residence on the tract and no attempt was ever made by him to reside upon or cultivate any of the land other than said lot 5, though it is not entirely clear from the testimony whether or not Johanson had reason to believe that his residence on any other portion of the land would be molested or his attempts to cultivate it interfered with. Apparently Cannon asserted no claim to any of the land except said lot 5, but his threats were in their nature general and the drastic measures taken by him to enforce his claim may have given some foundation to the belief on the part of Johanson that it would be unsafe for him to attempt residence on or cultivation of the remainder of the land. There is some evidence in the record to support this assumption. Though he made no attempt to rebuild, prior to initiation of contest, Johnson testifies that he often slept upon the land and on one occasion this action was resented by Cannon and he viciously assaulted the party who accompanied claimant, for which assault he was arrested and fined. Since the initiation of contest Johanson has erected a house and established residence on the land, though not upon lot 5, and apparently has not been molested.

Your office, relying upon departmental decision in the case of *Swain v. Call* (9 L. D., 22), held that even though Johanson was prevented by the acts of Cannon from occupying the portion of the land entered by him and claimed by Cannon, he was not excused from fully complying with the law as to the remainder of his entry to which the claims and threats of Cannon did not extend.

Duress sufficient to excuse claimant from complying with the requirements of law has been repeatedly defined by the Department. (See *Kinman v. Appleby*, on review, 32 L. D., 526, and cases therein cited). That such duress existed as to said lot 5, through the threats and acts of Cannon, is beyond controversy. Whether as a reasonable man, exercising ordinary prudence, Johanson was justified in the belief that the threats and acts of Cannon extended to the remainder of his entry, is not so clear. Conceding that he was not so justified, the question is presented as to whether he was bound to establish residence at another place upon the land and cultivate and improve the land open to him.

The object and intent of the law was to confer upon and secure to the homestead claimant, the "*exclusive* benefit of his homestead right" (*Anderson v. Carkins*, 135 U. S., 483, 489). Alienation, contrary to the usual rule in respect to land, is restricted as against the policy of the statute, for to permit it might defeat the enjoyment of the exclusive right by the persons sought to be benefitted. This right extends to all the land covered by the homestead entry and the law

has sought to protect it by suitable and effective safeguards. It follows therefore that the entryman's absolute right to the entire possession and enjoyment of the land carries with it the right to build his house wherever he sees fit, and any obstruction of this right is an interference with the exclusive possession and enjoyment of the entire tract.

The good faith of the claimant was evidenced by his attempts to establish a residence on lot 5 of his entry, and there can be no presumption of bad faith because of his failure to maintain such residence in the face of the unlawful interference by Cannon, which clearly excused such failure. Your office held, in effect, that as between claimant and contestant, the equities of claimant were superior and that cancellation should not be ordered if by such action Cannon would be allowed to take advantage of his own wrong. But as Cannon could secure no rights by his contest, under your said decision, the question was left solely between the government and the entryman and as to the government Johanson was bound to evidence his good faith by establishing residence upon and cultivating and improving the remainder of the tract. In other words, the government is permitted to take advantage of Cannon's wrong to the prejudice of the entryman. To this doctrine the Department is unwilling to accede. The general and more liberal rule that where good faith is apparent and the controversy is one solely between the government and the entryman, the entry should be held intact, is more in keeping with the spirit of the homestead law, and the Department is of opinion the rule announced in the case of *Parsons v. Hughes* (8 L. D., 593, 595) is controlling in the case at bar. It was there held that where the claimant had been wrongfully ejected from that portion of the land upon which she had established residence, it was not incumbent upon her to go upon another portion of the land and establish another. The right of selection in such matters goes hand in hand with the right to the exclusive enjoyment of the entire tract, and a denial of one is an interference with the other.

In the case cited in your said decision (*Swain v. Call, supra*) it was stated that "the evidence relied upon as showing duress on the part of Swain is not by any means sufficient to sustain such finding." That case should not therefore be allowed to control in cases similar to the one here under consideration, where the evidence clearly established the plea of duress.

For the reasons herein stated, the decision appealed from is affirmed in so far as it holds for dismissal the contest of Cannon, and modified in so far as it holds for cancellation the entry of Johanson upon the rejection of the final proof submitted by him. The entry will remain intact and he will be permitted to submit a supplemental showing as to his compliance with the law during the lifetime of the entry.

ARID LAND—IRRIGATION PROJECT—ACT OF JUNE 17, 1902.

OPINION.

The act of June 17, 1902, affords authority for the purchase by the United States of an incomplete irrigation system to be used in connection with, and to become a part of, a larger system contemplated by the government.

The provision of section 5 of the act of June 17, 1902, restricting the sale of a right to use water for land in private ownership to not more than one hundred and sixty acres, will not prevent the recognition of a vested water right for a larger area and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the government.

The Secretary of the Interior has no authority to enter into any agreement providing that an entry of public lands may be consummated in any manner or at any time other than as provided by the law under which such entry is made.

Assistant Attorney-General Campbell to the Secretary of the Interior, January 6, 1906. (W. C. P.)

In his letter of November 8, 1905, the Director of the Geological Survey stated that the Umatilla project, in Oregon, had been found feasible; that it would irrigate about 20,000 acres of land east of the Umatilla River, at an estimated cost of fifty dollars per acre, and recommended that the sum of \$1,000,000 be set aside for the project. With this letter he transmitted a copy of a proposed contract, by which the Maxwell Land and Irrigation Company, which has partially completed the construction of a canal system to irrigate its lands, by which said company is to turn over to the United States its irrigation works and water rights and to place its lands under the project and bind itself to make sale thereof in such manner as to conform to the provisions of the reclamation act. The original of this agreement, which had been signed on behalf of the company, had been returned for certain corrections.

This letter was returned to the Director for report on the following propositions:

1. Do not the provisions of paragraph 2 of the enclosed agreement conflict with the provisions of paragraph 5 of the reclamation act prohibiting the right to the use of water on land in private ownership in excess of 160 acres?

2. Are not the provisions of paragraph 11 likewise in conflict with the provisions of said paragraph 5 of the reclamation act?

3. What authority has the Secretary of the Interior, under existing law, to approve the provisions of paragraph 13 of said agreement which contemplates the extension of time for compliance with the provisions of the desert land act?

The Director, in his report of November 16, answers that the first and second propositions in the reference are not, in his opinion, in conflict with the provisions of the reclamation act, and submits the third proposition to the Department for consideration.

The letter of November 16 has been submitted to me for "an opinion, first, upon the questions presented herein, and, second, as to whether any legal objection exists to the approval of the accompanying 'agreement to sell' of the Maxwell Land and Irrigation Company."

Paragraph 1 of the proposed agreement provides that the Maxwell Land and Irrigation Company will sell and convey to the United States for the uses and purposes contemplated by the reclamation act of June 17, 1902 (32 Stat., 388), its main canal, laterals, diversion works, structures for impounding or distributing water, rights of way, and all water rights held or claimed, with all appurtenances in any wise used in connection with the company's canal system, for the sum of \$15,000.

Paragraph 2 reads as follows:

It is further agreed that the United States shall recognize a vested water right in the said company, or its assigns for three hundred (300) acres, to be hereafter selected by it in tracts, not less than twenty acres conforming to the public land subdivisions within the limits of the East Umatilla project of the Reclamation Service, to the extent of the water supply furnished to other lands under the said project. The water right for the said three hundred (300) acres shall be a perpetual water right, subject to the same regulations as to quantity and time of delivery prevailing under the said project, but shall be subject to no other condition than the payment to the United States of an annual maintenance charge of the same amount as that fixed for other lands under said project.

Paragraph 3 provides that the company will place under the provisions of the reclamation act its lands irrigable under said project, aggregating between 8000 and 9000 acres, excepting the tracts reserved in paragraphs 2 and 5.

Paragraph 4 provides that the lands referred to in paragraph 3 shall be conveyed to a trustee satisfactory to both parties, that they may be sold to parties competent to take and hold the same under the reclamation act.

Paragraph 5 provides that there shall be excepted from the provisions of paragraphs 3 and 4 a townsite of 160 acres, and in addition thereto forty acres of land as a water-shed to protect the spring from which water is supplied and intended to be supplied to said townsite, and the right of way from said forty acres to the townsite.

Paragraph 6 provides that the company shall convey the premises to the United States by a good and sufficient deed of conveyance.

Paragraph 7 provides that the United States shall purchase the property upon the terms expressed in the previous paragraphs.

Paragraph 8 provides that existing liens or incumbrances of said premises may be provided for by retention of a sufficient amount of the purchase money.

Paragraph 9 provides that the officers of the United States may have unrestricted access to said premises for the purpose of surveying for the construction of reclamation works.

Paragraph 10 provides that the company will sell to the United States any lands required for reservoirs, canals, or other irrigation works, at a consideration not to exceed six dollars per acre.

Paragraph 11 provides that the company may retain possession of, maintain and operate its present water system so far as may be necessary to supply water to lands now irrigable by the same and dependent thereon until the government project shall replace the same, and that the company may supply to the parties named in Schedule A water sufficient to complete their cultivation under the desert land act of the tracts as set forth in said schedule.

Paragraphs 12 and 13 provide that parties named in Schedule B, being claimants under the desert land act and dependent upon water to be supplied them by the company under that portion of its system not yet constructed, may complete the acquisition of said public lands by obtaining water under the reclamation act, "and that they shall have such extension of time in which to conform to the requirements of the desert land act as may become necessary on account of their obtaining water for such lands from the reclamation project," with the provision that the lands so to be furnished with water shall not exceed 160 acres to each claimant.

Paragraph 14 provides that the agreement shall not operate to bind the United States to purchase said premises until approval by the Secretary of the Interior, and

Paragraph 15 provides that the provisions of the agreement shall inure to the successors and assigns of the respective parties thereto.

The Director of the Geological Survey states that a water right for at least 300 acres has now vested in the company and that to eliminate this water right by purchase would require a larger expenditure than would be justified. He states that the proposition to leave this water right in the company and to provide for the flowage of the water through the canal to be constructed is the course usually pursued by individuals under like conditions.

When an abstract of title in connection with the Klamath Falls irrigation project was under consideration in this office it disclosed an apparent obligation upon the property perpetually to deliver water without charge for expense of operation or maintenance, to certain parties, and the opinion was expressed that these obligations were of such character as to prohibit acquiring the property under the irrigation act. At that time the agreement involved in that matter was not before this office and its conditions were not set forth. Reference is made to this because it is stated that the agreement there is substantially the same as the one under consideration now. That the act of June 17, 1902, affords authority for the purchase of a partially constructed irrigation system has heretofore been held by

the Department. In my opinion of February 6, 1905, in the California Development Company (33 L. D., 391, 404), it was said:

If this system as now constituted is to be considered as a separate, distinct and complete project there might be very potent argument produced against its purchase and in support of the proposition that such a purchase would not come within the purview of the law, but when considered as only a section of the greater system to be constructed under the general project for utilization of the waters of this river, its purchase clearly comes within the purview of the law and may be consummated unless some other prohibitive obstacle is presented.

The effect of this agreement, if it be completed, will be to transfer to the United States the incompleted irrigation system of the company, to be used in connection with, and to become a part of, the larger system contemplated by the government. I have no doubt that such a transaction is well within the powers conferred by the act of June 17, 1902.

Whether the reservations provided for in paragraph 2 of the agreement may be recognized presents another question. The water right thus reserved has become vested and the purport of the agreement is to recognize this fact. This right is to be recognized in the construction and operation of the larger system and to be protected by allowing the continued flowage of the water covered by the right through the works to be constructed by the United States. The plan proposed is frequently resorted to in dealings between individuals. The principle involved is recognized in the laws and upheld by the courts of most, if not all, of the States in the arid region. Undoubtedly the sale by the United States to any one person of a right to the use of water for more than 160 acres would be in conflict with the provisions of section 5 of the reclamation act. The transaction involved here is not a *sale* of the water. The United States has no title and does not propose to take any title to the water right reserved in paragraph 2 of the proposed agreement. The transaction is therefore not prohibited by the provision in section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership.

The only obligation assumed by the United States is to allow the water covered by this reserved right to flow through the canal to be constructed under its project, and the company in whose interest the reservation is made assumes its share of the annual maintenance charge. After careful consideration I am of opinion that the provisions of paragraph 2 of the proposed agreement do not conflict with the provisions of paragraph 5 of the reclamation act.

By the proposed agreement the land reserved is apparently relieved of any liability to contribute to the cost of the irrigation project; in other words, it is not brought within the limits of that project. The

burden placed upon the lands within the project is proportionally increased by the withdrawal of the reserved lands therefrom. It has presumably been decided that the cost of the undertaking will not be so great as to render the scheme impracticable, but, at any rate, that is a question which this office is not in position to determine. It is an administrative question which arises in connection with every project and therefore one for whose solution the officers in charge of the work must be held responsible.

I do not find any ground for apprehension that the provisions of paragraph 11 of the proposed agreement would be in conflict with the provisions of section 5 of the reclamation act. That paragraph simply provides that the company may continue to operate its present system until replaced by the government project. It is evidently intended by this paragraph to protect existing rights pending the construction of the government works. No legal objection to this plan can be urged, but, on the other hand, any plan which would not provide for the protection of the people who have lands now under irrigation would be open to serious criticism.

By paragraph 13 of the agreement it is provided that claimants under the desert land act who have made entries upon the theory that they would be able to obtain water from the company's system so as to submit proofs within the time prescribed by law, shall be allowed such extension of time as may be necessary because of the proposed change of ownership of the system. There is no authority in the Secretary of the Interior to waive the provisions of the desert land law. This proposition is so plain that it seems unnecessary to discuss it at length. The Director of the Geological Survey is of opinion that the authority "to allow final proof to be made at such time as would be possible under the reclamation project seems to be deducible from several departmental decisions, as, for instance, in the case of *Thompson v. Bartholet* (18 L. D., 96)." That decision does not support the proposition that the Secretary of the Interior may enter into an agreement that the plain provisions of the law may be disregarded. He has no authority to make any agreement providing that an entry for the public lands may be consummated in any manner or at any time other than as provided by the law under which such entry is made, and if he should enter into such agreement it would afford no protection to the entryman. In his letter of December 1, 1905, the Director of the Geological Survey, referring to this class of entries, said:

It would not be necessary for the Department to commit itself to an extension of time for the making of final proof on these entries. All parties interested would be satisfied with a declaration by the Department that, if final proof on these entries can not be made within the statutory time for reasons falling within the rules of the Board of Equitable Adjudication they will be considered

under such rules, good faith being shown on the part of these entrymen. An approval of the contract with a qualification to this effect would, it is believed, be accepted by the Maxwell Land and Irrigation Company. In the opinion of this office such action, if deemed proper by the Department would be but fair to these entrymen who should be informed as to the status of their entries if they are to depend upon the project.

If, when final proof is presented on any such entry, it is found that it comes within any rule for consideration by the Board of Equitable Adjudication, it would be disposed of in that manner, and there would seem to be no good reason for refusing to make a statement to that effect.

The general question in the note of reference as to whether any legal objection exists to the approval of this agreement seems to demand a consideration of the whole instrument. The various paragraphs thereof and their effect have been set forth quite fully herein. It is not believed that any provision thereof, excepting such as have been pointed out in discussion of the specific questions submitted, presents a legal objection to the approval of the agreement.

Approved:

E. A. HITCHCOCK, *Secretary.*

OKLAHOMA LANDS—RESERVATION WITHIN VACATED TOWNSITE—ACT
OF MAY 11, 1896.

CITY OF ENID.

Where a patent has not issued for a public reservation in a townsite at the date the townsite is vacated, and the original entryman for such reservation fails to make application therefor within six months from the vacation of the townsite, it thereupon, under the provisions of the act of May 11, 1896, becomes subject to disposal as an isolated tract under section 2455 of the Revised Statutes, and can not be disposed of in any other manner.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 6, 1906.* (E. F. B.)

By letter of September 5, 1905, you transmit the appeal of the City of Enid from your decision of May 9, 1905, rejecting its application for a patent to that part of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 22 N., R. 6 W., Kingfisher, Oklahoma, commonly known as block 1 of "McGuire's Addition to Enid," and dismissing its protest against the sale of said land as an isolated tract.

The NW. $\frac{1}{4}$ of said section 8 was entered by Luther M. McGuire as a homestead in 1893. In 1895 the entryman commuted to cash the SW. $\frac{1}{4}$ of said NW. $\frac{1}{4}$ under the provisions of section 22 of the act of May 2, 1890 (26 Stat., 81, 92), which authorizes the purchase

of the homestead, "or any part thereof for townsite purposes," upon the condition that reservations shall be made for public purposes.

A patent thereupon issued for all the land embraced in that part of the homestead commuted to cash, except the land reserved, which was designated on the plat as "Public square donated for parks, schools, or other purposes." This was in conformity with the express provisions of the statute.

Subsequently, W. H. McNeeley, who had acquired title to said homestead, vacated the townsite plats under authority of an act of the legislature of Oklahoma, approved February 27, 1895, which authorized the proprietor of such subdivision to vacate the same, except the reservation for public purposes and one street leading to any interior reservation, by a written instrument duly executed and recorded.

The act of Congress of May 11, 1896 (29 Stat., 116, 117), provides that where a patent for a reservation in such vacated townsite *has not been issued*, it shall be lawful for the Commissioner of the General Land Office to issue a patent to the original entryman for such reservation upon payment of the homestead price therefor (ten dollars per acre), and if the original entryman shall fail or neglect to make application for the reservation within six months from the vacation of the townsite, or from the passage of said act, it shall be subject to disposal under the provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895. (See City of Enid, 30 L. D., 352.)

The second section of the act of May 11, 1896, provides that where the patent has issued, or shall hereafter issue, for such reservation, the town or municipality, upon the vacation of the townsite, may sell the same at public or private sale and convey the lands to the purchaser, and cover the proceeds of such sale into the school fund of such town or municipality.

In this case the patent *had not issued*, and the original entryman failed to make application for the purchase of the reservation within six months from the vacation of the townsite. It therefore became subject to disposal as an isolated tract under section 2455 of the Revised Statutes, and can not be disposed of in any other manner. The city of Enid can not be restored to its former right to such reservation by the action of the owner of the townsite refiling the plats as an addition to said city.

Your decision is affirmed.

APPLICATIONS FOR USE OF NAME OF UNITED STATES IN JUDICIAL PROCEEDINGS TO FORFEIT RIGHTS OF WAY.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 6, 1906.

In any case of an application for the use of the name of the United States in a suit or suits to be instituted to secure, on account of the nonperformance of a condition subsequent, a judicial declaration of forfeiture of rights of way granted over the public lands and reservations of the United States, the application should be addressed to the Secretary of the Interior and filed with the Commissioner of the General Land Office, and if upon examination proper grounds are shown for the institution and maintenance of such suit, said Commissioner will call upon the grantee or his or their successor in interest, as the case may be, to show cause within ninety days why the proper proceedings shall not be instituted. If no satisfactory showing shall be made within the prescribed time the Commissioner of the General Land Office, upon the execution of a good and sufficient bond to indemnify the United States against all liability for costs, will forward the application to the Secretary of the Interior with appropriate recommendation, whereupon such action will be taken as the circumstances of the case seem to warrant. If the application is allowed it will be necessary that further application be made to the Department of Justice for a commission to the applicant's attorney as special United States attorney, with nominal compensation, authorizing him to represent and defend the interests of the United States in such suit or suits as may be allowed.

A form of indemnifying bond, drawn by the Department of Justice, is printed herewith and should be strictly followed.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

KNOW ALL MEN BY THESE PRESENTS: That we, _____
_____ of _____, as principal, and _____
_____,
a corporation created and existing under the laws of the State of _____
as surety, are held and firmly bound unto the United States of America in the full
and just sum of _____ thousand dollars, lawful money of the United
States, to be paid to the United States; for which payment, well and truly to be
made, the said _____ bind _____ heirs, executors,

and administrators, and the said _____
 _____ binds itself, its successors and assigns, firmly
 by these presents.

In witness whereof, the said _____
 _____, as principal,
 hereunto set _____ hand and seal, and the said _____
 _____,
 as surety, has caused these presents to be sealed with its corporate seal and
 signed by _____
 this _____ day of _____, in the year one thousand nine
 hundred and _____.

The condition of the foregoing obligation is such that whereas the said _____
 _____ made and filed _____ applica-
 tion for permission to use the name of the United States in a suit to be instituted
 by _____ for the purpose of declaring forfeited certain rights of way for _____
 purposes, approved _____, in favor of _____

_____, which said rights of way it is claimed
 by the said _____
 _____ have been forfeited because of
 a failure to comply with the laws relating thereto, and which said rights of way
 interfere with the right of way sought to be acquired by the said _____

Now, therefore, if the said application for permission to use the name of the
 United States in said suit for the purpose above stated shall be granted, and the
 said suit shall be instituted in the name of the United States, and the said _____

shall pay all costs or judgment for money that may be awarded or rendered
 against the United States on account of said suit, and shall in every way save
 the said United States harmless in respect of any order made in such proceeding
 or any judgment for money or costs rendered therein, then this obligation shall
 be void; otherwise, to remain in full force and virtue.

Signed, sealed, and delivered
 in the presence of _____

_____	_____
(As to principal.)	Principal.
_____	_____
_____	Surety.
_____	By _____
_____	_____
(As to surety.)	

JUSTIFICATION BY CORPORATE SURETY.

[This form is to be used in connection with the execution of the foregoing bond when the
 surety thereon is a guaranty or surety company, and this affidavit must be annexed to the
 bond.]

State of _____ }
 County of _____ } ss.

Personally appeared before me, _____
 on this _____ day of _____, one thousand nine
 hundred and _____, known to me to be the _____
 of _____
 _____, the corporation described in and which

executed the annexed bond of _____, as surety thereon, and who, being by me duly sworn, deposes and says that he resides at _____, in the State of _____; that he is the _____ of the said _____

Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of _____; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of _____

_____ is the corporate seal of the said _____,

_____ Company, and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority, as _____ of said company; and that he is acquainted with _____ and knows him to be the _____ of said company; and that the signature of said _____, subscribed to said bond, is in the genuine handwriting of said _____,

and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of _____ dollars (\$_____).

Deponent further says that _____, residing at _____, in the State of _____, has been duly appointed as the agent of said company to accept service of process against said company in the _____ judicial district of _____, and is authorized to enter an appearance in behalf of said company in any action, suit, or proceeding brought against it in said judicial district.

Sworn to, acknowledged before me, and subscribed in my presence this _____ day of _____, 19____

KNOW ALL MEN BY THESE PRESENTS: That we, _____

of _____, as principal, and _____

of _____, as suret_____, are held and firmly bound unto the United States of America in the sum of _____ thousand dollars, lawful money of the United States of America, to be paid to the United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this _____ day of _____, one thousand nine hundred and _____

The condition of the above obligation is such, that whereas the said _____ made and filed _____ application

for permission to use the name of the United States in a suit to be instituted by _____ for the purpose of declaring forfeited certain rights of way for _____ purposes, approved _____ 1 _____, in favor of _____

which said rights of way it is claimed by the said _____ have been forfeited because of a failure to comply with the laws relating thereto, and which said rights of way interfere with the right of way sought to be acquired by the said _____

Now, therefore, if the said application for permission to use the name of the United States in said suit for the purposes above stated shall be granted, and the said suit shall be instituted in the name of the United States, and the said _____ shall pay all costs or judgment for money that may be awarded or rendered against the United States on account of said suit, and will in every way save the said United States harmless in respect of any order made in such proceeding, or any judgment for money or costs rendered therein, then this obligation shall be void; otherwise to remain in full force and virtue.

[L. s.]

[L. s.]

[L. s.]

[L. s.]

Signed, sealed, and delivered in the presence of—

(As to principal.)

(As to surety.)

State of _____ } ss.
County of _____ }

I, _____, one of the sureties on the annexed bond, being duly sworn, depose and say that I am worth, after paying my just debts, the sum of _____ thousand dollars, exclusive of property exempt from execution by the laws of the State in which I reside.

Subscribed and sworn to before me this _____ day of _____, A. D. 19____

(The above statement should be sworn to by each of the sureties.)

CONTEST—SUSPENDED ENTRY—CHARGE.

PORTER v. CARLILE.

A contest based solely upon the ground that the entry is invalid because the land embraced therein is not of the character subject to such entry, may be allowed, notwithstanding the entry, at the date of the initiation of the contest, was embraced in an order of suspension issued by the land department.

In case of the suspension of an entry by order of the land department the entryman is not compelled to comply with the law during the period of suspension, and contest on the ground of failure to comply with the requirements of the law during such period should not be allowed.

Where contest against a suspended entry, on the ground of failure to comply with law, is erroneously allowed by the local officers, and hearing had thereon, the testimony adduced at the hearing, having been taken without jurisdiction, can not be considered upon removal of the suspension.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 9, 1906.* (E. O. P.)

Herbert C. Porter has appealed to the Department from your office decision of July 31, 1905, reversing that of the local officers and dismissing his contest against the desert land entry of James M. Carlile for lots 1, 2, 3, 4, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 17 N., R. 3 E., Greatfalls land district, Montana.

In said contest affidavit two grounds were alleged as a basis therefor, viz: that the land entered was not desert in character, and failure to comply with the requirements of the desert land law.

The entry in question was made December 24, 1901. The land embraced therein was covered by your office letter of October 8, 1903, withdrawing certain lands from entry under the desert land laws and suspending such entries already made, pending an investigation "by a special agent to determine their *bona fides*." Contest affidavit was filed February 17, 1904.

On February 18, 1905, your office, upon an incomplete record, rendered decision sustaining the contentions of Porter and directing the cancellation of the said entry. On appeal by Carlile, the Department, on July 19, 1905, remanded the case to your office for further consideration, in order that a decision might be rendered upon the record as it then stood and the effect of said order of suspension upon the jurisdiction of the local officers to entertain the contest determined. It is from the decision rendered in accordance with instructions of the Department that the pending appeal was taken.

After alleging as error the action of your office in denying the jurisdiction of the local officers to entertain the contest of Porter, it is contended, in the second and third specifications of error, that your office was without authority to take further action or render another decision, after an appeal from the decision first rendered had been taken. Had such action been taken by your office after appeal, upon its own motion, this objection might be worthy of serious consideration, but under the circumstances here presented, it is difficult to determine upon what basis such contention may rest, as the authority of the Department to direct such further consideration by you is not to be denied. Had such action not been taken the Department would

necessarily have been called upon to decide the case upon a different record from that before your office, and to first construe an order of suspension made by you. This the Department was unwilling to do, and the action taken was in no way prejudicial to the rights of the parties, because they were fully protected by the right of appeal, whereby the whole matter could be brought before the Department upon the merits.

In passing upon the question of jurisdiction the Department is of opinion the decision appealed from is correct. Had the basis of contest been only the invalidity of the entry in question by reason of the character of the land, such contest, though filed subsequent to the order of suspension, might have been allowed under the rule announced in the case of *Adams v. Farrington* (15 L. D., 234, 237), but for no other cause. By such a contest the sole purpose of the government in directing the suspension would be carried out, and of this the entryman could not complain. However, in view of the fact that during the suspension of an entry by order of the land department time does not run against the suspended entry and the entryman is not compelled to show compliance with the law during the period of suspension, it would be manifestly unjust to allow contest to be brought upon that ground.

The request of appellant that the local officers be directed to consider the testimony taken in the present contest when the suspension now in force has been removed must also be denied, for two reasons: first, less than half the statutory life of the entry had elapsed at the time it was suspended, and as time does not run against the entry while under suspension, the claimant still has the remainder of the statutory period, after the suspension is removed, within which to show compliance with the law, and testimony taken long prior to the expiration of such period would not be sufficient to warrant the Department in ordering a cancellation of the entry for failure to comply with the law, and, second, the action of the local officers being a mere nullity for want of jurisdiction, the Department is without authority to validate that which was void from the beginning.

While the hardship complained of by appellant in prosecuting his void contest at great expense is fully recognized by the Department, yet it knows of no rule of law whereby the relief asked can be granted without serious prejudice to the rights of the entryman. For the reasons herein stated, the decision appealed from is hereby affirmed.

NORTHERN PACIFIC RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

STAFFORD *v.* NORTHERN PACIFIC RY. CO.

Directions given that in case a selection by the Northern Pacific Railway Company is canceled for conflict, and thereafter, in the adjustment of the conflicting claims under the provisions of the act of July 1, 1898, the individual claim is canceled upon relinquishment, the selection of the company be immediately reinstated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 9, 1906.* (E. J. H.)

October 30, 1897, one Joseph F. Juza made homestead entry for lots 2 and 3, NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 27, T. 17 N., R. 10 W., Olympia, Washington, land district, upon which certificate was issued to him September 1, 1898, and patent issued thereunder January 14, 1899.

The described tracts are within the indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, and lots 2 and 3 and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ were selected by said company April 28, 1885; per list No. 5, rearranged list No. 5, filed August 20, 1892, and supplemental list No. 5 of November 17, 1896, and canceled May 6, 1898. The SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ does not appear to have been embraced in said selection lists, so that there was no conflict as to that tract between Juza and the railroad company. Subsequently action was taken looking to an adjustment of said conflicting claims, under the act of July 1, 1898 (30 Stat., 597, 620), and Juza filed relinquishment of all of the tracts covered by his entry, accompanied by a quit-claim deed therefor.

January 16, 1905, Juza's entry and the patent issued thereunder were canceled under the provisions of the act of 1898. Juza was notified of his right to make entry of other lands in lieu thereof, and the company that the tracts involved were subject to its claim.

January 25, 1905, said company filed its selection list No. 65 for all of the described tracts, which was on the same day approved by the local officers.

March 14, 1905, John Stafford tendered his homestead application for said tracts, alleging that he established residence thereon December 17, 1904, with his family, consisting of his wife and two children, and had continued to reside there, and that he had made valuable improvements on the land. The local officers rejected said application for conflict with the indemnity selection of the Northern Pacific company; from which Stafford appealed.

August 4, 1905, your office decision held, that inasmuch as it appeared that the company made its former selection of lots 2 and 3

and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ prior to the date of Stafford's alleged settlement, and that the prior conflicting claims of Juza and the company thereto had been adjudicated under the provisions of the act of 1898, the action of the local officers in rejecting Stafford's application was correct, so far as it related to said tracts, and the same was affirmed.

As to the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, it was held that as the company did not select the same until January 25, 1905, the adjustment of the conflicting claims of Juza and the company did not apply thereto. As Stafford alleged settlement prior to the company's said selection of that tract, a hearing was ordered to ascertain whether he had a *bona fide* settlement thereon prior to the date of the company's selection.

From so much of said decision as related to lots 2 and 3 and the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Stafford has appealed to the Department, contending that as Stafford was an actual *bona fide* settler upon the land prior to the railway company's selection of said tracts on January 25, 1905, his claim thereto is superior to that of the company.

In disposing of this appeal it is deemed proper to say that your office when cancelling Juza's entry under his relinquishment and election to transfer his claim to other lands, should have reinstated the railroad selection formerly canceled, so as to prevent a hiatus occurring which might have misled some other person into making claim for this land. In this case however, Stafford was not so misled, for he alleges settlement prior to the cancellation of Juza's entry, and at the time of presenting his homestead application the selection as again presented by the railway company was of record. Under these conditions your office decision as to said lots 2 and 3 and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ was correct, and the same is affirmed.

In future you will see that in disposing of like conflicts under the act of 1898, the railroad selection is reinstated at the time of cancellation of the individual claim preliminary to allowing the transfer to other lands as provided for in said act.

SCHOOL LANDS-INDEMNITY SELECTION.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 10, 1906.

The following rules and regulations governing the selection of indemnity school lands are prescribed for the purpose of preserving a uniform method in all States and Territories having a grant of lands for common schools prior to the passage of the act of February

28, 1891 (26 Stat., 796), including the State of Utah, to which the indemnity provisions of said act were made applicable by the act of May 3, 1902 (32 Stat., 188).

The act of February 29, 1891, amending sections 2275 and 2276, Revised Statutes, is general and provides that:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral lands, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by the said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity land to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

SEC. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States or Territories

which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school lands in fractional townships.

1. The selections in any one list must not in the aggregate exceed 160 acres.

2. All lists of selections must be prepared so that each selection will correspond, approximately, in area with the base lands, or lands in lieu of which the selection is made. It is preferred that a separate base be assigned to each legal subdivision selected, but in no instance can any selection exceed 160 acres, nor can it consist of noncontiguous tracts.

3. Where the selection is based upon lands that have been disposed of by or under authority of any act of Congress, the base tract or tracts must be described by legal subdivisions, each in its entirety, except as provided in paragraph 5 hereof.

4. The cause of the loss must in each case be specifically stated. If caused by an entry based upon a settlement claim initiated prior to survey, the number of the entry must be given. If occasioned by a reservation of the land, entitling the States to idemnity, the date, name, and purpose of the reservation must be stated. If the loss occurs by reason the fractional character of the township, or the supposed mineral character of the land, it must be set forth.

5. Where the selection is for a loss occasioned by the fractional condition of the township from natural or other causes, or for lands included within a perfected claim, the survey of which is not in accordance with the rectangular system, any portion of the loss, not less than one acre, may be assigned as a basis, and any remaining portion, not less than one acre, may be used in future selections.

6. Where lands are reserved for school purposes and are after survey included in any Indian, military, or other reservation, or have been reserved for school purposes, "whether surveyed or unsurveyed," and are assigned as the basis for selection, the list must in every case be accompanied by a certificate of the officer, or officers, charged with the care and disposal of such school lands, that the State has not previously sold or disposed of, nor contracted to sell or dispose of any of said lands used as bases, nor any part thereof; that the said lands and every part thereof are free of all liens for taxes, costs, interest, and judgments, or any incumbrance of any nature whatsoever, and that the said lands are not in the possession or subject to the claim of any third party, under any law or permission of the State or Territory; and within three months after the filing of any such list of selections the State or Territory must in addition file a certificate from the recorder of deeds, or official custodian of the records of transfers of real estate in the proper county, that no instruments, purporting to convey or in any way incumber

the title to any of said lands, are of record, or on file in his office, and the failure to file such certificate within the required time may, upon the report of the local officers, result in the cancellation of the selection without previous notice from this office.

7. The selecting agent must file a certificate with each list showing that indemnity has not previously been granted for the assigned base, and that no previous selection is pending for such assigned base.

8. The lands selected must be from the unappropriated surveyed public lands, not mineral in character, within the State or Territory making the selection, and their nonmineral character must be shown by the affidavit of the selecting agent, or an agent appointed by him for that purpose, and if by the latter, evidence of his appointment should accompany his affidavits. A nonmineral affidavit can not be made upon information and belief, but must be upon the personal knowledge of the affiant and apply to every smallest legal subdivision selected; and, if the selected land is not within six miles of any mining claim, entry, or location, that fact must be shown by affidavit.

9. The legal fees required by law must accompany each list of selections.

10. No more than one number must be given to any list, notwithstanding the fact that it may contain more than one selection.

11. When a list of selections is received by mail on the morning that the selected lands are open to settlement, entry, and selection, it will be considered as proffered after the claims of all persons present at the time of opening of the office have been received (32 L. D., 648); but a list received by mail prior to the day of opening will be rejected because prematurely filed.

12. No application to select will be received for lands covered by an existing selection or entry of record, nor will any right be recognized as initiated by the tender of such an application (29 L. D., 29). Where the base land, or any part thereof, for an indemnity selection fails, no amendment thereof will be permitted.

13. The local officers are not authorized to accept the relinquishment of any State selection. All relinquishments will be forwarded to the General Land Office through the local office, when, if accepted, the local officers will be directed to cancel the same on their records, and after such cancellation is noted, and not before, the land will be subject to general disposition under the public-land laws.

14. The right to indemnity does not exist for the undisposed school sections within abandoned military reservations, the lands within which are subject to disposal under acts of July 5, 1884, and August 18, 1894, or special acts not making a specific disposition of the school sections (29 L. D., 418, Jan. 19, 1900).

15. Selections made prior to time that decision of January 19, 1900 (29 L. D., 418), was received at the local office, in lieu of school lands

within abandoned military reservations, or selections made in lieu of school lands within abandoned military reservations embraced within entries allowed prior to time that decision of January 19, 1900, was received at the local office, will, if otherwise regular, be allowed (act of Feb. 11, 1903, 32 Stat., 822).

16. When a school section is identified by the Government survey and no claim is, at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public-land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Claims of parties based upon mineral locations covering parts of a school section, asserting that same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the mining laws are presented. (Mahogany No. 2 Lode Claim, 33 L. D., 37; State of Utah, 32 L. D., 117.)

17. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character, whether returned by the surveyor-general as mineral or otherwise, in the absence of satisfactory proof that the base land (designated by legal subdivisions, *Bond v. State of California*, 31 L. D., 34) is known to be chiefly valuable for mineral. (Act of February 28, 1891, 28 Stat., 796; case of *State of California*, 33 L. D., 356.) The preliminary proof must show the kind of mineral discovered upon the land and the extent thereof; when and by whom the discoveries were made, and, as far as practicable, whether any claim to the land is asserted under the mining laws, and if so, by whom; the nature and extent of the mining improvements placed upon the land by the mineral claimant; and what efforts have been made and are being made to develop the land in good faith for mineral purposes.

Upon submission by the State of an *ex parte* showing, conforming substantially to the foregoing requirements, a hearing will be ordered to determine the character of the land, evidence to be submitted in support of the allegations contained in the preliminary showing. Notice of such hearing shall be given by the State by publication of at least once a week for five successive weeks in a newspaper to be designated by the register of the land office as published nearest to the location of such base land, and proof that the notice has been given must be filed in the local land office on or before the day of hearing (Sec. 2335, Rev. Stat.). If in any case the proof submitted at the hearing does not clearly show that the base land contains valuable mineral deposits, and is chiefly valuable on account of such deposits, a selection in lieu thereof will not be permitted.

18. A determination by the land department that a portion of the smallest legal subdivision in a school section is mineral land will place that entire subdivision in the class of lands that may be used as a basis for indemnity or lieu selection, and in all such cases there must also be furnished certificates of the proper State authorities, and of the officer in charge of the records in the county where the base lands are situated, showing that such lands have not been sold, encumbered, or otherwise disposed of, as required by paragraph 6 hereof.

19. Where the land sought to be selected in lieu of land within a school section has been returned by the surveyor-general as mineral, notice of the proposed selection must first be given by publication for sixty days, with posting in the local land office and upon each legal subdivision of land applied for, during the same period, and satisfactory proof submitted as to the nonmineral character of the selected land. Upon compliance with this requirement and in the absence of allegation that the land is mineral, the selection may be received, if otherwise regular, certified and forwarded, as required hereafter.

20. Where land sought to be selected in lieu of land within a school section has not been returned by the surveyor-general as mineral, but is alleged by way of protest to be mineral, or where application for patent therefor is presented under the mining laws, the proceedings in such cases will be in the nature of a contest, and will be governed by the rules of practice in force in contest cases.

21. Where land sought to be selected has not been returned as mineral, but is within six miles of a mining location, claim, or entry, the application to select must be accompanied with an application for publication of notice of the selection, which publication will be made at the expense of the State or Territory, and must commence within twenty days of the filing and continue for a period of sixty days, and the notice must be posted for the same period in the register's office and in a conspicuous place upon each legal subdivision applied for. During such period of publication the local officers may receive protests or contests as to any of the tracts applied for, claimed to be more valuable for mining than agricultural purposes.

22. Upon the filing of any such application for publication of notice of selection the register will prepare the proper notice and designate the paper in which same is to be published, which paper must be within the vicinity of the selected land. Should the State or Territory fail to make the required publication its application to select will be rejected, subject to the usual right of appeal to this office within thirty days after notice of the rejection.

23. No application which requires affirmative proof of the nonmineral character of the selected land, or of the known mineral character

of the base land, will be accepted until the preliminary requirements hereinbefore indicated have been complied with.

24. Where the State or Territory conforms to the preliminary requirements governing selections of land within six miles of a mining location, claim, or entry, or of the selection of lands upon alleged mineral bases, the register will certify as to the date of filing, the status of the lands selected, as shown by the records, and forward the list, together with all showing made either for or against the selection, to this office by special letter, without further action. The legal fees payable upon such selection must be tendered with the application to select and will be received and held as unearned fees and unofficial moneys until the selection has been allowed or finally rejected by this office, and in the meantime no action looking to a disposal of the land will be taken.

The foregoing regulations, with certain modifications and restrictions, are but a codification of existing regulations, and are not designed to disturb pending selections made in accordance with previous regulations.

Indemnity selections by the Territory of New Mexico, under act of June 21, 1898 (30 Stat., 484), must be made of lands as contiguous as may be to the base lands. Under the practice heretofore prevailing the law will be held to have been complied with where the selected land is within the same township as the base land. In other respects all of the foregoing regulations are applicable to the Territory of New Mexico.

W. A. RICHARDS, *Commissioner*.

Approved, January 10, 1906.

E. A. HITCHCOCK, *Secretary*

PRACTICE—APPEAL—NOTICE—CONTEST—PREFERENCE RIGHT.

TODD *v.* HAYS (ON REVIEW).

The Rules of Practice require that notice of an appeal to the Department shall be served upon the appellee or his counsel; but where decision in a case is inadvertently rendered by the Department in the absence of proof of service of the appeal, such decision will not be disturbed on motion for review, in the absence of a showing of reversible error, merely because of want of proper service of the appeal.

The mere tender, by an applicant to purchase under the timber and stone act, of the required proof, purchase price and fees, which are properly refused by the local officers, is not the equivalent of an "entry," within the meaning of the act of May 14, 1880, according a preference right to one who contests and procures the cancellation of an entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 10, 1906.* (J. L. McC.)

Your office, on December 22, 1904, dismissed the protest of Susan O. Todd against the allowance of the application of Charles E. Hays to make timber-land entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and lots 3 and 4, of Sec. 18, T. 2 N., R. 6 W., Oregon City land district, Oregon.

Hayes claimed the right to make said entry on the ground that he had instituted contest against the application of one Eureka H. Quick to make entry of said land, which application Quick had withdrawn, executing a relinquishment of all right, title and interest in and to the same, while his contest was pending.

From the action of your office in dismissing Todd's protest she appealed. The Department, on June 26, 1905, reversed said action of your office; held that a timber-land application "which has not ripened into an entry does not segregate the land;" that "a contest against such an application, although conducted to a successful termination, does not carry with it a preference right;" and therefore directed the cancellation of Hays's entry. (See 33 L. D., 655.)

Hays filed a motion for review of said decision, the first assignment of error being:

That Todd's appeal from the Honorable Commissioner's decision of December 22, 1904, was never served on appellee, and that an examination of the record will disclose the want of such service. Under the Rules of Practice, an appeal without service on appellee is a nullity. The Department never acquired jurisdiction of the case. The case stands as if no appeal had been taken. The time for filing an appeal has expired. The Honorable Commissioner's decision of December 22, 1904, should be affirmed and the case closed.

An examination of the record shows that there is no evidence that Todd's appeal from your office decision was ever served upon the opposite party. This omission was overlooked when the former departmental decisions were made.

It does not follow, however, that the Department is without jurisdiction in the matter. As was said in the case of the Pueblo of San Francisco (5 L. D., 483, 494):

The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public-lands, or the adjustment of private claims. . . . When proceedings affecting titles to lands are before the Department, the power of supervision may be exercised by the Secretary whether or not those proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary.

Referring more particularly to the case here under consideration, it would be absurd indeed to hold that the forgetfulness of an attor-

ney to serve an appeal could place the Department in a position where it would be compelled to allow a palpable injustice or a manifest error in law to remain uncorrected. Rule 115 of Practice distinctly provides:

None of these rules shall be construed to deprive the Secretary of the Interior of either the directory or supervisory power conferred upon him by law.

If the first specification of error is intended as a motion to reopen the case and dismiss the appeal because it was not served, the Department could with propriety refuse to consider the motion, because that was not served on the opposite party. It will not be thus considered, however, but will be treated as a specification of error. Thus treated, though the rendering of the departmental decision in the absence of proof of service of the appeal was a manifest inadvertence, it will not, under the well settled rulings as cited, unless reversible error is otherwise shown, be disturbed solely because of want of proper service of the appeal.

Under the circumstances, therefore, the Department will re-examine and consider the case on its merits, and on the specifications of error filed by Hays, as if in answer to the appeal of Todd, thus giving him his day in court, which he ought to have had on appeal.

The argument in support of the motion for review, referring to the departmental decision of June 26, 1905, concedes that, "under the facts heretofore presented, the Honorable Secretary correctly expounded the law;" but it contends that the facts set forth in certain documents accompanying the motion essentially change the condition of affairs. Said documents consist of the application of said Eureka H. Quick to make entry of the land in controversy, under the timber-land law; the several affidavits and other papers usually and properly accompanying such application; the testimony of two witnesses as to the character of the land and the qualifications of the applicant; the receiver's receipt for the fee (\$2.00) paid him for taking the above-mentioned testimony; also a copy of the receiver's endorsement upon the testimony:

Purchase price and fees tendered this date, 23d Dec., 1899, upon the within proof, and the same refused by authority of Hon. Commissioner's telegram of December 12, 1899.

Counsel for the movant contends:

It is not the purpose of this paper to controvert the holding of the decision of June 26, 1905, that a contest against a mere application to purchase lands under the act of June 3, 1878 (20 Stat., 89), though such contest be conducted to a successful termination, does not carry with it a preference right to entry under the provisions of the act of May 14, 1880.

Our contention is that at the time of the initiation of the contest of Hays against Eureka H. Quick, . . . Quick had done all that the law and the regulations pursuant to it demanded, and had filed all the proofs necessary to

make entry and receive patent for the land; had paid the fees to the register and receiver for the testimony submitted in support of her right, and had tendered the money in payment for the land; and hence that she, then and there, possessed the legal equivalent of an entry, which to all intents and purposes amounted to an entry within the meaning of the act of May 14, 1880, respecting contests and preference rights Under the law and under the regulations, said Quick, having done everything required and demanded to be done in the premises, became thereupon instantly entitled, under the law, to make entry. Her right to the land then vested—*prima facie*, at least Quick had on the face of the record the legal equivalent of an entry. It was that legal equivalent which Hays contested; and having done so, and succeeded in his contest, he was clearly entitled to the preference right of an entry awarded by the act of May 14, 1880, not as contesting a mere application to purchase, but as contesting an entry *de jure*, if not one *de facto*.

Heretofore it has always been understood by the Department that joint action of the applicant on the one hand and of the local officers on the other, was requisite in order to make an entry of a tract of land; but if this contention of counsel be correct, any person wishing to make entry of a given tract can do so unassisted—in the face of the rightful refusal of the local officers, and in defiance of orders of your office to the contrary. But such is most certainly not the case. The contention of counsel regarding Quick's acts—that "these steps taken by her segregated the land; this segregation was equivalent to an entry"—is not well founded; the money tendered must have been received, and receipt issued therefor, in order to render such action "equivalent to an entry." As was said by the Department in the case of *Thomas v. St. Joseph and Denver City Railroad* (3 C. L. O., 197), quoted with approval in *Gilbert v. Spearing* (4 L. D., 463), and again in *Iddings v. Burns* (8 L. D., 224):

Each of the three elements of which this transaction is composed forms an essential part thereof—the application, the affidavit, and the payment of money; and when the application is presented, the affidavit made, and the money paid, an entry is made, a right is vested.

Even more strongly against the contention of the movant is the language of the United States Supreme Court in the case of *Witherspoon v. Duncan* (4 Wall., 210, 219): "When the entry is made, and certificate given, the particular land is segregated from the mass of public lands, and becomes private property." Again (*Hastings etc. Railroad v. Whitney*, 132 U. S., 357, 363):

Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make entry; second, he must make formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him the entry is made—the land is entered.

The rule thus established is equally applicable to entries under the timber and stone act.

As recently as August 30, 1905, the Department rendered a decision in the case of *Jones v. Northern Pacific Railway Company* (34 L. D., 105), in which "Jones applied to purchase the tract under the timber-and-stone act, *supra*, and after due publication and proof, made entry thereof, December 10, 1898. At the date of the purchase, but not at the date of the application, the tract in controversy, with others, was withdrawn from entry by virtue of departmental order of February 28, 1898." The Department held (page 111):

There was no purchase until the money was paid But it is contended that the application of Jones was the equivalent of an entry. While such an application, if presented in accordance with law and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against the government; and prior to the submission and acceptance of final proof, and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. (*Board of Control, Canal No. 3, State of Colorado v. Torrence*, 32 L. D., 472.) This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898; and the purchase of Jones, allowed in violation of that order, initiated no right falling within the remedial provisions of the act of July 1, 1898.

It is not denied that, had the tender of the purchase money been a proper one, and been wrongfully refused by the register and receiver, the rights of Quick would have been as fully protected, under the decisions of the courts and of the Department, as though the money had been accepted and receipted for. But Quick is not here claiming that any wrong has been done her. If she had rights in the premises, it is more than questionable whether a mere contestant, by virtue of his contest, is subrogated to the equities of the contestee, and can claim the benefit of them. However, in this case the contestee, Quick, acquired no such rights or equities; for the tender was not a proper one, because made in the face of the lawful and prohibitory order of your office—made at a time when the register and receiver could not accept the same; therefore it was properly rejected by them. Consequently there was no legal tender; and the case stands, in contemplation of law, as though no tender had been made. The facts do not bring this case within the ruling of any of the cases cited by counsel for the movant.

It is not intended herein to decide that, under proper circumstances, a timber-land application is not contestable under Rule No. 1 of the Rules of Practice, as stated on page 42 of the General Circular. This may well be authorized to be done by the Department. But by such contest no preference right is to be acquired, inasmuch as Congress has thought proper to legislate on that subject, granting a preference right as a reward, and giving it only where a party has contested and procured the cancellation of an "entry," of the classes named in the act of May 14, 1880 (21 Stat., 140). There having been no entry by Quick, there could be no cancellation of one.

The error thus exposed in the movant's contention invalidates his entire argument, carefully built thereon—which therefore need not be further discussed.

Inasmuch as the motion fails to show that the movant has been in any manner prejudiced by the appellant's failure to serve his appeal from your office decision (of December 22, 1904), or that the departmental decision (of June 26, 1905, *supra*), contained any reversible error, no reason appears why said departmental decision should be disturbed.

The motion for review is overruled, and herewith transmitted for the files of your office.

In this connection the attention of your office is called to Rule 82 of Practice, which directs:

When the Commissioner considers an appeal defective, he will notify the party of the defect; and if not amended within fifteen days from the date of the service of such notice, the appeal may be dismissed by the Secretary of the Interior, and the case closed.

It is obviously implied by this rule that when appeals are presented to your office they should be carefully examined, and if found to be defective, that action should be taken as directed. If an examination of the appeal in this case had been made, it would have disclosed the fact that there was no evidence of service thereof in the record, and said appeal should have been returned for evidence of service. Such action would have prevented the complications that have subsequently arisen. You will direct that hereafter the requirements of this rule be observed in each case, and that none be forwarded to the Department until the rule has been complied with by your office.

FOREST RESERVE LIEU SELECTION—CONTESTANT—PREFERENCE
RIGHT—ACT OF JUNE 4, 1897.

BOWLBY *v.* HAYS.

The fact that a successful contestant who in the exercise of his preference right applies to select the land under the act of June 4, 1897, did not have title to the land assigned as base for the selection at the date of the initiation of the contest, furnishes no ground for rejection of the application, it being only necessary that the selector have title to the base land at the time he initiates the proceeding for an exchange under the act by relinquishing it to the United States.

General allegations in a protest filed with a view to defeating a successful contestant's preference right, tending to show a speculative intent and immoral practice in other contests instituted by the same contestant, are not sufficient to bring into question his preference right in a case wherein his conduct is unimpeached.

The preference right of entry accorded a successful contestant by the act of May 14, 1880, does not accrue to one who contests and procures the rejection of an application to purchase under the act of June 3, 1878.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 10, 1906.* (J. R. W.)

Theodore P. Bowlby appealed from your decision of April 8, 1905, rejecting his application under the act of June 3, 1878 (20 Stat., 89), to purchase the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 3, T. 2 N., R. 7 W., W. M., Oregon City, Oregon.

September 20, 1899, Edith Tuttle filed a similar application, against which, July 8, 1901, Charles E. Hays filed a contest. February 20, 1904, Bowlby filed his application, which was held suspended in the local office to await final action on Hays's contest. August 15, 1904, Hays, by G. B. McLeod, attorney in fact, filed application under the act of June 4, 1897 (30 Stat., 36), to select the land in lieu of land relinquished to the United States in a forest reserve. August 29, 1904, your office canceled Tuttle's application and awarded Hays, as successful contestant, a preference right of entry. The local office minuted Hays's application and September 19, 1904, recommended its approval. October 3, 1904, Bowlby filed a protest against approval of Hays's selection and claimed prior right in himself as second applicant to purchase. Hays's selection of the land under his preference right is attacked on three grounds: (1) That the base assigned for the selection was acquired after the initiation of contest; (2) that the contest was speculative; (3) that contest will not lie against a mere application to enter and that no preference right arises from such proceedings.

Your decision held that it is sufficient if a selector has title to the base land at the time he initiates the proceeding for an exchange by relinquishing it to the United States. There was no error in so holding. The ownership of the base is the qualification to appropriate public lands by this form of entry. The qualification of an entryman must exist at the date of the entry (*Gourley v. Countryman*, 28 L. D., 198), and it is sufficient if qualification of a successful contestant exists at the time he exercises the preference right. (*Reas v. Ludlow*, 22 L. D., 205.)

The allegations of the protest as to the speculative character of the proceeding are that at about the same time that Hays initiated his proceeding against Tuttle's application he took similar proceedings against thirty-five similar applications, eighteen of which resulted successfully, and in ten others there were dismissals of the contests accompanied by relinquishments of the original applications and of the preference and the lands in six of them were taken under state school land indemnity lists, one by a Northern Pacific Railway Com-

pany selection and in three cases by forest lieu selections, by persons not named; that in the remaining seven cases the original applications were canceled or relinquished and Hays took the lands, one by timber and stone purchase and the other six by forest lieu selections.

The charge of speculative character of the contest in the present instance is conclusively negated by the record itself. Hays seeks to exercise the preference right himself and it is not alleged that he ever offered or negotiated to waive it. The act of May 14, 1880 (21 Stat., 140), offers a preference right of entry as a reward to the informer who discloses to the government facts that show an entry of public lands to be in violation of law. Right to the reward accrues upon the successful result of a contest. The law does not require that the contestant shall have a certain qualification, as, for instance, that he was never guilty of violation of the land laws, or of the immoral practice of bringing a contest with view to selling a waiver of his preference right which is not assignable. It would tend directly to defeat the object of the act to hold that misconduct or immoral practice of an informer in other cases affected the rights accruing to him in a case wherein his conduct is unimpeached. It follows that such a charge with view to defeating a successful contestant's preference right must state facts tending to show a speculative purpose in the particular instance and that general allegations tending to show speculative intent and immoral practice in other contests instituted by the same contestant do not alone bring in question his preference right in a case where no special allegation of fact is made tending to show that that particular contest was instituted with speculative intent. No such fact is alleged and it follows that no charge of speculative intent justifying a denial of the preference right was made.

The third contention is that no preference right accrues by proceedings against a mere application when no entry has in fact been made. Holding the contrary, your office cited and relied upon the authority of *Olmstead v. Johnston* (17 L. D., 151). That decision is not authority therefor. In that case Alice M. Milligan had made an entry which Olmstead contested, and April 25, 1891, it was canceled as the result of such contest. May 4, 1891, Catherine Johnston was permitted to file her timber land statement, and May 16, 1891, Olmstead, claiming a preference right by reason of his successful contest of Milligan's entry, presented his timber land statement for the same land. Your office, April 23, 1892, held that Olmstead, by contest of Milligan's entry, acquired a preference right, and this was affirmed by the Department by analogy to the decision in *Fraser v. Ringgold* (3 L. D., 69), which was a contest against a desert land entry. Neither of these decisions recognized or was predicated upon a contest against an application to enter.

By the act of May 14, 1880, *supra*, the preference right of entry is granted to an informer who pays the land office fees, successfully contests and procures cancellation of "any preemption, homestead or timber culture entry." By construction the word "preemption" was held in *Fraser v. Ringgold* to include "desert land entry," and by parity of reasoning in *Olmstead v. Johnston* was held to include timber and stone entries. But the Department has not held in any case cited or that search by the Department has disclosed, that an application to enter is within the statute offering a reward for proceedings against an entry. The contrary was held in *Jacoby v. Kubal* (29 L. D., 168), a homestead application, and in *Field v. Black* (2 L. D., 581), in an attempted contest against a pre-emption declaratory statement. The preliminary application, or statement of intent, is, under the act of June 3, 1878 (20 Stat., 89), the analogue of and answers to the declaratory statement under the pre-emption law, and is what classifies a proceeding under that act as generically a pre-emption entry. (*Hughes v. Tipton*, 2 L. D., 334.)

It necessarily follows that under the act of May 14, 1880, no preference right is obtained by such a proceeding. A timber and stone application does not segregate the land (*California v. Nickerson*, 20 L. D., 391, 392), but other applications made thereafter and received by the local office must await action thereon. If one desire to acquire lands subject to such an application pending, he must make application therefor, and in connection therewith, for protection of his own right, may protest against allowance of the application pending. He can in that manner raise any question going to the right of the prior applicant to make entry.

In the present case Hays made no application for the land prior to that of Bowlby. He got nothing by his attempted contest. (*Todd v. Hays*, 33 L. D., 655.)

It has not been overlooked that paragraph 16, page 42, General Circular of January 25, 1904, states that: "Contests may be brought against timber and stone land *applications* or entries in accordance with rule 1 of Rules of Practice;" and that rule 1 of practice is that: "Contests may be initiated by an adverse party or other person against a party to an entry, filing, or other claim under laws of Congress relating to the public lands." The land department entertains such proceeding for its information and with view to prevent unlawful appropriation of public lands. Congress has, however, granted a preference right only to those who contest an entry.

An entry is that action of record whereby the United States by its proper officer recognizes that an individual right has attached to a tract of public land, and that the United States is obligated to convey to him the legal title. (*Hastings, etc., R. R. Co. v. Whitney*, 132 U. S., 357, 363-4.)

Courts of equity regard "an entry as the commencement of title." (*Hoofnagle v. Anderson*, 7 Wheat., 212, 214; *Brush v. Ware*, 15 Pet., 93, 110.) Upon an entry a contract arises for conveyance of the legal title. In *Parsons v. Venzke* (164 U. S., 89, 92), the court held that:

An entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price, they issue a receiver's receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. . . . The effect of the entry is to segregate the land entered from the public domain, and while subject to such entry it can not be appropriated to any other person or to any other purposes.

All unreserved and unappropriated public land is subject to disposal under the acts of Congress and in the modes thereby defined. Until such land is entered it is subject to appropriation by the first legal applicant, and the land department is not authorized to exclude public land from appropriation of a legally qualified applicant by awarding a preference right which Congress has not authorized it to grant.

Bowlby has therefore the clear prior right to consummate his application by complying with the terms of the act of June 3, 1878, *supra*. In case he does so, Hays's selection, which is subject to Bowlby's right, will be rejected. If Bowlby fail to perfect his application, Hays's selection will be permitted to stand. The papers are herewith returned for further proceedings conformable hereto.

APPLICATION TO PURCHASE—TIMBER AND STONE ACT.

SANTA FE PACIFIC R. R. CO. ET AL *v.* RANKLEV.

Applicants for public lands lose no rights by mistakes and laches of officers of the land department; but persons claiming the benefit of this rule must show that they have an inchoate right and that they have not been so dilatory in assertion of it as to give rival *bona fide* applicants a superior right.

No rights are acquired by an application to purchase under the timber and stone act presented at a time when the land was not subject to such appropriation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 11, 1906.* (J. R. W.)

David N. Winton, transferee of the Santa Fe Pacific Railroad Company through mesne conveyances, intervener, appealed from your decisions of June 15, 1905, and December 23, 1904, rejecting the selection of the Santa Fe Pacific Railroad Company, number 6448, your office series, under the act of June 4, 1897 (30 Stat., 36), for the SW. $\frac{1}{4}$, Sec. 19, T. 156 N., R. 27 W., 5th P. M., Cass Lake, Minnesota, in lieu of land relinquished to the United States in a forest reserve,

and awarding to Martin E. Ranklev the right to purchase the tract under the acts of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348).

December 22, 1894, the land, then unsurveyed, was included in applications of E. J. Turney, under section 4 of the act of February 8, 1887 (24 Stat., 388), for allotments to Indian minors. The applications were noted on the local office tract books. June 15, 1899, they were rejected.

July 15, 1895, while such allotment applications were pending, the township plat of survey was filed in the local office. The next day Ranklev tendered, with the legal fees, his declaratory statement under the act of 1878, *supra*, which was also noted on the local office record. Edwin T. Bigelow also tendered his homestead application, alleging settlement, which the local office rejected for conflict with Turney's allotment applications, and Bigelow appealed to your office. Soon after, the date of filing not appearing, Ranklev filed in the local office his protest, sworn to before a notary public July 17, 1895, corroborated by two witnesses, against the Indian allotment applications. The Ranklev application and protest were mislaid in the local office and were not reported or transmitted to your office, as should have been done. Bigelow's appeal was transmitted December 7, 1895.

June 15, 1899, when Turney's Indian allotment applications were rejected, your office, not having Ranklev's application and protest before it, or any report of their existence, directed the local office to allow Bigelow's entry, and he made entry July 5, 1899, which he relinquished January 6, 1900, and applied to enter the land, as assignee of soldiers' additional homestead rights, under section 2306 of the Revised Statutes of the United States.

January 20, 1900, in transmitting Bigelow's latter applications, the local office transmitted Ranklev's declaratory statement and protest of July 16, and 17, 1895, reporting that without action thereon they were mislaid, and were finally found among the old files of the office. August 1, 1902, your office held that, as Bigelow's additional homestead applications were clearly fraudulent, it was unnecessary to take any action upon Ranklev's timber and stone application, and held it suspended pending final action upon Bigelow's applications.

October 2, 1902, the local office received the application of the Santa Fe Pacific Railroad Company under the act of June 4, 1897, *supra*, and transmitted it, December 16, 1902, to your office, which appears to have received and held it without action thereon, or objection thereto, until June 15, 1905.

December 10, 1902, Bigelow's additional homestead applications were rejected and the case was closed.

September 29, 1904, your office took up Ranklev's application for action and held that, as four years had passed since rejection of the Indian allotment without Ranklev's publication of notice or any indication of his intent to pursue his application, he had abandoned it, and it was rejected. October 8, 1904, Ranklev was served with notice of such order, and October 22, 1904, filed affidavit that when he filed his application he was informed that the land was covered by the Indian allotment application, and that if that were rejected he would be notified and be allowed to complete his application to purchase; that he then employed an attorney, and repeatedly made inquiries of him and was informed that the matter was yet pending without action by your office; that he never received notice from his attorney or the local office, and that he made the application in good faith, and has always been ready to take out notice, to comply with the law, and to complete his purchase, and asked leave to do so. December 23, 1904, your office held the affidavit sufficient, and allowed him sixty days therefor. Notice issued February 21, 1905, was duly posted and published, and May 18, 1905, on the day appointed, he made proof.

May 5, 1905, David N. Winton, remote transferee of the selector, by deed of conveyance of January 31, 1903, intervened, and filed in your office his objections to approval of Ranklev's purchase, and prayed approval of the forest lieu selection, and June 6, 1905, he filed a motion for reconsideration of your decision of December 23, 1904, allowing Ranklev to purchase.

June 15, 1905, your office denied the motion and held that the allowance of Bigelow's homestead entry and his location of soldiers' additional rights, and the action of your office September 29, 1904, in rejecting Ranklev's application, were all erroneous and in violation of Ranklev's right.

Error of the local office in not forwarding Ranklev's timber and stone application can not be allowed to hold the land indefinitely against appropriation by another proceeding in good faith under the law to acquire it. Ranklev made his application at a time when the land was not subject to such appropriation, being *sub judice* under the allotment applications.

It is against the intent and declared policy of Congress to permit indefinite segregation of land from other appropriation by applications for purchase under the timber and stone act that are not diligently prosecuted. If he advertise, but for any reason, though not due to his own fault, fails to consummate his purchase, he can not keep his claim alive to the prejudice of an intervening adverse applicant. James N. True (26 L. D., 529); Caleb J. Shearer (21 L. D., 492); John M. McDonald (20 L. D., 559).

If Ranklev's application be regarded as made at the time the allotment applications were rejected, June 15, 1899, he was bound to

prosecute it with reasonable diligence. He could not await indefinitely holding the land from other appropriation while others without notice of his claim were proceeding to acquire a right to it. It was held in *Moran v. Horsky* (178 U. S., 205, 208) that:

One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title and deal with it as theirs, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. . . . There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity.

It is a general principle that applicants for public lands lose no rights by mistakes and laches of officers of the land department, but persons claiming benefit of this rule must show that they have an inchoate right, and that they have not been so dilatory in assertion of it as to give rival *bona fide* applicants a superior one. Ranklev can do neither. From June 15, 1899, to October 22, 1904, he made no assertion of right or sought information from the land department or action of any kind upon his lost and delayed application. He contented himself with inquiries of his attorney, and the attorney took no action to bring his claim to the attention of the land office. In the meantime others were expending efforts to acquire the land. Bigelow was allowed a homestead entry June 15, 1899, and relinquishing that January 6, 1900, made the location of the soldiers' additional rights, and, they being rejected, October 2, 1902, the selector made its selection, conveyed whatever equity it had to Coffin, who conveyed to Bigelow, who conveyed to Winton, the intervener. In view of the Department, Ranklev acquired no right by his application made at a time when the land was not subject to his purchase, and had he acquired an inchoate right, he is by reason of his laches in no position to assert it against a later applicant who has filed and prosecuted with diligence his application for the land.

Your office decision is reversed and Ranklev's application is rejected.

DESERT LAND ENTRY—CONTRACT TO CONVEY AFTER PATENT.

HERBERT C. OAKLEY.

Recognition in the act of March 3, 1891, of the right of assignment of desert-land entries furnishes no authority for recognizing a right on the part of a desert-land entryman to enter into an executory contract to convey the land after the issuance of patent and to thereafter proceed with the submission of final proof in furtherance of such contract.

Departmental decision in the case of *Wheaton v. Wallace*, 24 L. D., 100, modified.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 15, 1906.* (E. O. P.)

Herbert C. Oakley has appealed to the Department from your office decision of February 25, 1905, approving the recommendation of the local officers and rejecting final proof offered by him in support of his desert land entry for the E. $\frac{1}{2}$, Sec. 13, T. 15 S., R. 13 E., S. B. M., Los Angeles land district, California, and holding said entry for cancellation.

The entry in question was made September 12, 1900, and final proof thereon was submitted November 4, 1903. Original and supplemental briefs have been filed by counsel and the questions presented by the appeal have been orally argued before the Department. In addition, supplemental showing in the form of various affidavits, has been made and the record before your office for consideration and upon which your decision is based, has been amplified and many of the material facts, as originally presented, have been more fully set out and explained. In the decision appealed from the facts disclosed by the original record are fully and correctly stated, but in view of the supplemental showing since made, a re-statement thereof is necessary to an orderly review thereof and a clear understanding of the questions now presented for final determination.

At the time the entry in question was made the claimant, Herbert C. Oakley, was a member of a partnership, the additional members of which were J. W. Oakley and F. C. Paulin. The object of this firm was to conduct a general real estate business, with its main offices in Los Angeles, California. On December 4, 1901, J. W. Oakley entered into a certain agreement, on behalf of the Oakley-Paulin Company to transfer to the Imperial Land Company, a corporation, all the land covered by the entry of Herbert C. Oakley, "as soon as practicable after title has been perfected," together with certain shares of stock in the Imperial Water Co. No. 1. The clear intent of said contract was that it should be executory only and not operate to pass any present interest in the entry, as in the case of an assignment thereof, and the passing of the title was to depend upon the condition precedent that Oakley submit final proof and receive patent to the land in his own name. Your office found that the claimant was a member of the said corporation and perhaps naturally inferred from the record then before you that he was a member thereof at the time he made the entry in question and at the time said contract was entered into by the firm of which he was also a member. From the supplemental proof since submitted, it appears that while claimant is now a member of said corporation, he did not become such until February 13, 1902, subsequent to the time of making the contract in question.

There has also been filed with the Department a duly executed annulment of said contract, dated March 18, 1905. Your office found that the entry in question was fraudulent in its inception and that the original contract to convey the land was a valid one and enforceable at law. The many suspicious circumstances surrounding the transaction, as disclosed by the original record, arising out of the apparent close relations existing between the entryman, the partnership and the corporation, at the time the entry was made, and the finding that the subsequent contract was a valid one, formed the basis for the strong presumption of fraud in the inception of the entry. The supplemental showing made on behalf of the entryman, disclosing the real facts and explaining his various relations with his co-partners and with the corporation, tends strongly to overcome the presumption, and in view of the facts presented by the complete record now before it, the Department is of opinion that no fraud can be imputed to the claimant at the time he made the entry. A finding of fraud is only warranted by clear and convincing proof, and upon less the Department is unwilling to question the *bona fides* of the entryman.

Oakley, in an affidavit executed August 1, 1904, clearly and frankly states his intention at and subsequent to the time of the execution of the contract with the Imperial Land Company, on December 4, 1901, by J. W. Oakley, on behalf of the firm of Oakley-Paulin Company. He states:

it was not the intention at the time of the execution of the contract of December 4, 1901, that the same should *operate as an assignment*, but that it was for the purpose of guaranteeing to the Imperial Land Company that it would be safe in subdividing, platting and contracting to sell lots of this subdivision acting as the agents and for the benefit of Herbert C. Oakley and Frederick C. Paulin, *and* in the belief that he had a *perfect right* so to contract, and in order to meet the pressing demand for more ground for townsite purposes, and for guaranteeing to the prospective purchaser that he would be safe in contracting for portions of the land and contributing by his efforts and improvements to the building up of said town of Imperial.

In the brief of counsel it is stoutly contended that if the good faith of claimant at the time of entry made, be established, then the right of claimant to enter into an executory contract to convey the land entered, after issuance of patent to him, must, under the departmental decision in the case of *Wheaton v. Wallace* (24 L. D., 100), be recognized. Claimant's contention is thus stated by counsel (brief p. 28):

But if an entryman makes entry in good faith, and for his own exclusive use and benefit, and then one or two years after, having complied with all the requirements of law, changes his mind and contracts to assign the entry at that time to another, *or to convey title after securing patent*, he then having complied with the requirements of the law and being entitled to make final

proof and receive patent, there can be no objection to this sort of an arrangement under the statute as it now reads, and under the decisions of this Department construing that statute.

In the departmental decision relied on in support of this contention (*Wheaton v. Wallace, supra*), and referring to an alleged executory contract entered into by the entryman, the following statement appears:

Your office construed it, but it is harmless, since, if it were to be considered as evidence, its terms show that it has reference to a transfer *to be made after final proof*, and was entered into at a time when it would not have been unlawful to make an assignment of the entry under section seven of the desert land act, as amended by the act of March 3, 1891 (26 Stat., 1095).

An examination of the facts upon which the decision referred to was based shows that a construction of the contract referred to therein or a consideration of its effect upon the entry in question was unnecessary to a complete determination of the issue involved, inasmuch as it was held that there was no proof of the existence of such contract and the instrument purporting to be a certified copy thereof was not properly a part of the record. The language used is therefore purely *obiter*. The effect of the rule as announced was probably not fully considered and no more was intended than that such contract might be upheld if limited in all respects the same as an absolute assignment of a present interest. In any event the Department, in the consideration of the contention of claimant, upon the facts now properly before it, will not be restricted by the narrow construction urged by counsel upon the authority cited. While absolute assignments of desert land entries are recognized as valid, it does not follow that the language of the act of March 3, 1891 (26 Stat., 1095), allowing such assignments, recognizes the right of the claimant to execute an executory contract to convey the land after the issuance of patent, and thereafter proceed with the submission of final proof in furtherance of his contract. The result of the recognition of such a right in the claimant is clearly manifest and the effect thereof might easily operate to nullify that provision of the act which declares that "no person or association of persons shall hold, by *assignment or otherwise*, prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands."

In the case of absolute assignments of such entries, the assignee assumes the position of an original entryman, so far as his qualification to take is concerned, and he being the person then charged with the submission of satisfactory proof of compliance with the law, is before the land department in his own right and all future transactions respecting the entry are conducted directly with him. The land department in such case has before it the real party in interest and can deal with him personally. By the recognition of an executory con-

tract to convey after patent, leaving only a nominal party in interest before the Department, who would be permitted to submit proof of his own qualifications and compliance with the law, with no requirement as to proof of the right of the real beneficiary to take the land, a far different end may be accomplished, directly contrary to the spirit and intent of the desert land law. By proceeding under such contracts, any person or corporation might easily acquire a quantity of land greatly in excess of that allowed under the act. The Department, while recognizing the validity of absolute assignments of desert land entries, is clearly of opinion that any extension of the privilege accorded by the plain terms of the act, especially in the manner contended for by claimant, is entirely unwarranted, and proof of the existence of such contracts should prevent the acceptance of the final proof. Otherwise the practical effect of an assignment is realized through the medium of such contracts, without any of the incidents thereof attaching, and an easy method of evading that portion of the act which prevents a single individual, association or corporation from holding by "assignment or otherwise," under the desert land law, more than three hundred and twenty acres, is opened to all and this positive limitation effectively nullified. The clear intent of the desert land law forbids recognition of contracts to convey after patent, and this, too, irrespective of the time the contract was made and regardless of whether or not the original entry was made honestly and in good faith.

Your office, in passing upon the contract entered into by the Oakley-Paulin Company, signed by J. W. Oakley as a member of said firm with the Imperial Land Company, to transfer the land entered by Herbert C. Oakley, found that said contract was enforceable at law. The general rule in cases of partnership is that one partner, by virtue of his relation only, has no implied authority to transfer real estate *belonging to the firm*, and the Department is of opinion that one co-partner is wholly without authority to convey realty owned by another partner *individually*. Realty, in order to become partnership property, "must have been bought with partnership funds, for partnership purposes, though the deed may be made to the several partners, to hold them and their heirs, and the same can only be conveyed by a *deed executed* by those having the legal title." (Washburn on Real Property, Vol. 1, 668; Devlin on Deeds, Vol. 1, Sec. 110.) If it be established that real estate is partnership property, within the rule announced, it seems, under the modern doctrine, that if a contract be entered into by one co-partner to convey, without express authority therefor, but with the knowledge and subsequent assent of the other members of the firm, such subsequent assent may be deemed a ratification of the contract and the members of the firm held to a performance thereof. (Copp v. Longstreet, 38 Pac., 601; Gibson v. Warden, 14 Wall., 244; Haynes, Hutt & Co. v. Seachrest

et al., 13 Ia., 455; Devlin on Deeds, Vol. 1, Sec. 111.) But in each instance where the English rule was thus departed from and the doctrine of subsequent ratification recognized, the property sought to be conveyed was partnership property, and the doctrine has no application to a conveyance by one co-partner of the individual property of his co-partner. In the case at bar it is self-evident that all the land embraced in the contract was not and could not have been the property of the firm of Oakley-Paulin Company. There is no evidence of any assignment by the entryman to the firm and in his supplemental affidavit accompanying the appeal he expressly denies the right of the partnership to claim any interest in the land.

In view of the doubt cast upon the validity of the original contract and the further fact that there is now on file with the Department an absolute revocation thereof, and the further finding of good faith on the part of the entryman at the time he initiated his claim, the Department is of opinion the proof offered, if in other respects satisfactory, should be accepted.

Accompanying the record on appeal is the application of Vaclav F. Kucera to contest the entry in question. In view of the action taken by your office, no consideration thereof was necessary and the same is returned herewith for such disposition as your office may deem best, in view of the present departmental decision upon the other questions presented by the appeal.

The decision of your office is modified accordingly.

SETTLERS UPON RAILROAD LANDS—ACT OF APRIL 19, 1904.

MATTHEW O'MEARA.

The act of April 19, 1904, providing that settlers or entrymen upon lands within the indemnity limits of the grant in aid of the Chicago, St. Paul, Minneapolis and Omaha railway, and also within the primary limits of the grant in aid of the Wisconsin Central railroad, restored to the public domain November 2, 1891, by order of the land department, who were prevented from obtaining title under the public land laws because under the decision of the Supreme Court in the case of Wisconsin Central Railroad Company *v.* Forsythe the lands were held not to be excepted from the grant to the Wisconsin Central company, has no application to lands opposite the unconstructed portion of the Wisconsin Central road, which fall within the forfeiture provisions of the act of September 29, 1890.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 15, 1906.* (F. W. C.)

The Department has considered the appeal by Matthew O'Meara from your office decision of September 19, 1905, rejecting the proof offered in support of his homestead entry made October 22, 1903, for

the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 8, T. 18 N., R. 16 E., W. M., North Yakima land district, Washington, and holding for cancellation the final certificate and receipt issued on said entry.

The proof submitted upon the entry in question did not show settlement, residence and cultivation upon the land included in the said entry, but claimed the benefit of a residence of five and a half years, and cultivation during that time, of the SE. $\frac{1}{4}$ of Sec. 29, T. 49 N., R. 10 W., Ashland land district, Wisconsin, pursuant to the act of Congress approved April 19, 1904 (33 Stat., 184). The act in question provides:

That all qualified homesteaders who, under an order issued by the Land Department, bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Company against Forsythe, One hundred and fifth-ninth United States, page forty-six; and all qualified homesteaders who made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Northern Pacific Railroad and The Dalles military wagon road, under orders issued by the Land Department treating such lands as forfeited railroad lands, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wilcox against Eastern Oregon Land Company, one hundred and seventy-sixth United States, page fifty-one, shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their bona fide residence upon and the amount of their improvements made on the lands for which they were unable to complete title: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

The tract above described in the State of Wisconsin is within the indemnity limits which were withdrawn on account of the grant made by act of June 3, 1856 (11 Stat., 20), in aid of the construction of what was known as the Bayfield Branch of the Chicago, St. Paul, Minneapolis and Omaha railway. By the act of May 5, 1864 (13 Stat., 66), a grant was made to the State of Wisconsin in aid of the construction of what was known as the Wisconsin Central railroad, and said tract fell within the primary limits of said grant as adjusted to the line of definite location. At the time of the adjustment of the Omaha grant in 1891, lands within the indemnity limits of the Omaha grant and also within the primary limits of the Wisconsin

Central grant were treated as excepted from the latter grant because of the prior reservation on account of the Omaha grant, and all such lands, not needed for the adjustment of the Omaha grant, were restored to the public domain, after due notice, on November 2, 1891. This tract was treated as a portion of the lands included in said restoration, and on the morning of November 2, 1891, one John Hutchinson tendered a homestead application for said tract and, there being no other application for the land, the same was accepted by the local officers and permitted to go of record.

On the 25th of that month O'Meara tendered a homestead application for the same land and in support thereof alleged that he had made settlement thereon between 7 and 8 o'clock on the morning of November 2, 1891, and upon this allegation of settlement, which was prior to the time of the opening of the local land office on that morning, hearing was duly ordered and held.

At the hearing Hutchinson introduced testimony showing that he had made settlement upon the land on October 24, 1891, by clearing off a piece of ground upon which he built a house and that he had since maintained his claim thereto. As to the settlement claim by O'Meara, it was shown that on the morning of November 2, 1891, he cut some brush and laid four poles in the form of a square, which he stated was intended for the foundation of a house. These poles were only four inches in diameter at the large ends and were not used for the purpose named at the time he built his house, which was on the 25th of that month.

Regulations prescribed by the Department governing the restoration of the surplus Omaha lands refuse recognition of acts performed prior to the day of opening, and for this reason the local officers, in disposing of the case, held that Hutchinson acquired no right by reason of the acts performed prior to November 2, 1891, but, upon the record made, found in his favor because it was held that the acts performed by O'Meara did not constitute a valid settlement.

Your office decision affirmed that of the local officers upon the ground that "the contestant's case is lacking in the necessary elements requisite to constitute his said settlement rights superior to those of the defendant." The case was further prosecuted by appeal to this Department, but in the meantime the Supreme Court had rendered decision in the case of *Wisconsin Central Railway Co. v. Forsythe* (159 U. S., 46), in which it was held that reservation for indemnity purposes on account of the Omaha grant was not sufficient to except the land so reserved from the operation of the Wisconsin Central grant. This particular tract was opposite the unconstructed portion of the Wisconsin Central grant, and therefore became subject to disposition under the provisions of the general forfeiture act of September 29, 1890 (26 Stat., 496).

In view of said decision it was said in the departmental decision of April 28, 1896 (not reported), that "under the last-mentioned act the acts performed by Hutchinson prior to November 2, 1891, must be considered in the disposition of this case, and upon the record as made I am of opinion that he has clearly shown a superior right to the land even though the claimed settlement by O'Meara were recognized." Your office decision was accordingly affirmed.

O'Meara now claims that but for the intervening decision of the Supreme Court in the case of *Wisconsin Central Ry. Co. v. Forsythe*, *supra*, this land would have been treated as a part of the surplus Omaha lands and when so treated that his claim would have been given precedence over that of Hutchinson, and that therefore he was prevented from completing title to said land because of said decision, and, under the provisions of the act of April 19, 1904, *supra*, should be given credit for the period of his *bona fide* residence upon and the amount of his improvements made upon said land in making proof upon the entry here, in question.

From the above recitation it must be apparent that appellant's contention can not be maintained. Both your office and the local officers in disposing of the contest between O'Meara and Hutchinson, involving the Wisconsin lands, held that his acts performed prior to the opening of the land to entry as a part of the surplus Omaha lands and to the entry by Hutchinson, did not amount to a valid settlement. In view of the decision of the Supreme Court in the case of *Wisconsin Central Ry. Co. v. Forsythe*, *supra*, it becomes unnecessary to specifically pass upon this question in disposing of O'Meara's claim. Had it, however, been necessary, upon the recitation made in said decision, the concurring decisions of your office and the local officers would have been affirmed.

A further reason for denying the contention is that in the opinion of this Department the act of 1904, was passed only for the protection of those who had made settlement or entry of lands restored under the order of November 2, 1891, as a part of the surplus Omaha lands, and were prevented from obtaining title under the public land laws because under the decision of the Supreme Court in the case referred to they were afterward held not to be excepted from the Wisconsin Central grant but were embraced therein. This is made plain in the report of this Department dated February 17, 1902, upon H. R. Bill 10,515, "to provide for the relief of certain settlers upon Wisconsin Central railroad and The Dalles military road land grants." In this report it was said:

The purpose of the bill is a worthy one and should be expressed in a law which will give the intended relief to all who were misled by the departmental action in the two instances named. The pending bill is imperfect in that it only relates to those who made homestead entry and does not include the

equally meritorious cases where qualified homesteaders made settlement and improvement with a view to entry.

The bill is also limited as respects the Wisconsin Central grant to entries "of lands appearing, on November 2, 1891, by the records of the Interior Department, as forfeited Omaha lands." No element of forfeiture was involved.

The only question was whether the lands were excepted from the Wisconsin Central grant by reason of their prior withdrawal for the benefit of the Omaha grant. The Department, taking the affirmative view of this question and finding that the lands were not needed to satisfy the Omaha grant, restored them to settlement and entry by order of October 22, 1891, which took effect November 2, 1891. The Supreme Court, June 3, 1895, in the Forsythe case, held that the lands were not excepted from the Wisconsin Central grant, but were embraced therein, and thus those who had made settlement or entry under the order of November 2, 1891, were prevented from obtaining title under the public-land laws, and if they obtained title to the lands upon which they had settled and erected improvements they did so by purchase from the Wisconsin Central Company.

The lands in question were not opposite the constructed portion of Wisconsin Central road. As a consequence, they were forfeited by the act of 1890, which act made due provision for settlers upon the forfeited lands and no further legislation was necessary with regard to said lands.

The decision of your office is affirmed and the final certificate issued upon O'Meara's entry will be canceled.

**HOMESTEAD ENTRY—LEGAL REPRESENTATIVES—SECTION 2305, R. S.,
AS AMENDED BY THE ACT OF MARCH 1, 1901.**

PETER W. TOMPKINS.

By virtue of the provisions of section 2305 of the Revised Statutes as amended by the act of March 1, 1901, proof of the death of a homestead entryman while actually engaged in the military service of the United States renders unnecessary any showing that would have been otherwise required touching his compliance with law in the matters of residence, cultivation and improvement.

The properly-constituted administrator of the estate of a deceased homestead entryman is authorized to submit final proof under the provisions of section 2305 of the Revised Statutes as amended by the act of March 1, 1901, as his "legal representative."

Upon satisfactory proof of the death of a homestead entryman while actually engaged in the military service of the United States, leaving no widow or minor orphan children surviving him, it is the duty of the land department, under the provisions of section 2305 of the Revised Statutes as amended by the act of March 1, 1901, to issue patent to his "legal representatives," leaving it to the courts to determine in whom the title shall vest.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 16, 1906.* (E. O. P.)

H. B. Grover, special administrator of the estate of Peter W. Tompkins, deceased, has appealed from your office decision of April

11, 1905, rejecting final proof offered in support of the homestead entry of said decedent for the NE. $\frac{1}{4}$, Sec. 22, T. 159 N., R. 60 W., Grand Forks land district, North Dakota.

The entry in question was made June 15, 1897. It is shown by information furnished by the War Department that the entryman, on April 26, 1898, enlisted in Company C, 1st Regiment, North Dakota Infantry, and was killed in action April 12, 1899. The entryman was unmarried at the time of his death and left as his only heirs at law his father and mother, residents of the Province of Ontario, and citizens of the Dominion of Canada. The entryman died intestate after having established residence on the land.

The final proof offered was rejected for the following reasons, viz: it fails to show compliance with the requirements of the homestead law, either as to residence, improvements or cultivation. Furthermore, there is no statutory authority under which an administrator, as such, may submit final homestead proof. *Vidal v. Bennis* (22 L. D., 124). It was held, in the case of *Patten v. Katz* (25 L. D., 453), that a homestead entry must be canceled when it is duly shown, after the expiration of the statutory life of the entry, that the entryman died prior to the completion of his entry, and that there are no heirs of the entryman who are entitled to perfect said claim. The alien heirs of a deceased homesteader are incompetent to make proof and perfect title under section 2291 of the Revised Statutes.

The appeal is based upon three distinct specifications of error, which, briefly stated, are as follows:

First: Error in rejecting the final proof for failure to show compliance with the law as to residence and improvement and cultivation.

Second: Error in rejecting the proof offered because there was no statutory authority under which the administrator could submit the same.

Third: Error in rejecting the final proof for the reason that alien heirs are prohibited from taking title to public land.

The contentions urged by counsel will be considered in the order stated. To this end an examination of the language of section 2305, as amended by the act of March 1, 1901 (31 Stat., 847), is essential to determination of the questions presented. It is therein provided, among other things, that—

in every case in which a settler on the public lands of the United States under the homestead laws died while actually engaged in the army, navy, or marine corps of the United States as private soldier, officer, seaman or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make

final proof upon and receive government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue.

The language used clearly sustains the first contention of counsel. By proof of the entryman's death in actual service of the United States, any showing that would have been otherwise required touching his compliance with the law as to residence, improvement and cultivation, is dispensed with.

Under the authority cited and relied upon by your office denying the right of an administrator to submit final proof, it would appear that, unless the provisions of section 2305 clearly warrant such action, the second contention of counsel must be denied. However, an examination of the decisions announcing such a rule discloses that they were based upon a construction of section 2291 of the Revised Statutes, and involved the question of final proof submitted under the provisions of said section. The language therein used leaves no room for other construction or a different conclusion, for the reason that among those specifically designated to submit final proof the "legal representative" is not mentioned. In the case of *Heirs of Isidore Driscoll* (32 L. D., 407) the Department recognized the right of the legal representative, by virtue of the provisions of section 2305, *supra*, to submit final proof, though it was also therein decided that the Department would not undertake to determine who would be "entitled to *take title*" as such.

By section 6461 of the Code of North Dakota (1895) the administrator is designated as the "legal representative" of the deceased. In this respect there appears to be no material difference between a special and general administrator under the law of that state. In the case of *Morehouse v. Phelps* (21 How., 294, 304) it was held that one acting in the capacity of an administrator was the "legal representative." See also decision by the same court in the case of *Briggs v. Walker* (171 U. S., 466 471), wherein it was held that:

The primary and ordinary meaning of the words "representatives" or "legal representatives," or "personal representatives," when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper court.

The record now before the Department furnishes ample proof that H. B. Grover, the party who submitted the final proof rejected by your office, was the party "constituted by the proper court" administrator of the estate of the deceased entryman. It would seem clear, therefore, that he was fully qualified to submit such proof.

This brings us to the consideration of the third specification of error, touching the qualification of the parties who may ultimately take title to the land. It is settled beyond controversy that the Department will not undertake to ascertain and identify the interests of such persons. Should it then, having before it a person qualified to submit the required final proof, look beyond him and seek to determine any further rights which may be involved in the distribution of the estate represented by the legal representative thereof? Certainly this is a question for the courts alone and with which, under the language of said section 2305, the Department has no concern. The closing words of section 2305, *supra*, are mandatory and declare "that patent shall issue." The condition determining this action is the submission of satisfactory proof by the proper parties, of the death of the entryman "while in the service of the United States as hereinbefore described." No other condition is annexed. The usual requirement of proof of residence, cultivation and improvement of the land is specifically waived. There is no limitation to be found in the words of this section, similar to that contained in section 2291, *supra*, touching the qualifications of the persons to whom patent shall issue.

The rule announced in departmental decision in the case of Heirs of Isidore Driscoll (*supra*, p. 410) that—

The Department will no more undertake to decide what particular person or persons may be *entitled to take title* as the "legal representatives" of a deceased entryman, than it will undertake to ascertain the identity and interests of the "heirs" of such an entryman—

is not inconsistent with the rule here adopted, for the reason that the term "legal representatives" as therein used refers only to the persons who may eventually take the *absolute title* to the land, and has no application to the legal representative appointed by the court and who could not under his order of appointment, take an absolute title to the land in his own right.

In the opinion of the Department a reasonable construction of section 2305, under which the final proof in question was submitted, clearly waives all requirements imposed in other cases as to residence, cultivation and improvement of the land entered, leaving proof of the death of the entryman in the actual service of the United States the only requisite to the issuance of patent, and warrants the acceptance of such proof whenever offered by the properly-constituted legal representative, in those cases where there is no surviving unmarried widow of the soldier. In other words, by his death under the conditions prescribed, the soldier has earned the patent, and the Department has no concern, after proof thereof has been regularly submitted, as to who may ultimately enjoy the benefits that have accrued and will not inquire into their identity, qualifications or interests in

the land. The adjustment of these questions is properly within the province of the courts.

For the reasons herein stated, the decision appealed from is reversed. The proof offered should be accepted and final certificate issue to the "legal representatives" of Peter W. Tompkins, deceased, pursuant to the provisions of said section 2305, *supra*.

CONTEST—PRACTICE—RESIDENCE—OFFICIAL EMPLOYMENT.

DAHLQUIST *v.* COTTER.

In case a contest is erroneously dismissed upon motion of the entryman, the General Land Office is without authority to reverse such action and then dispose of the case on the evidence theretofore submitted by contestant, without first affording the entryman an opportunity to present his defense. Where the testimony in a case is authorized to be taken elsewhere than at the local office, neither party should be permitted to submit further testimony on the day set for the hearing at the local office, except upon due notice to the other and proper order therefor.

Failure of a homestead entryman to reside upon his claim, necessitated by employment in the public service, will not be construed an abandonment thereof, where he in good faith established and maintained residence prior to engaging in such service and has continued to comply with the requirements of the law in the matters of cultivation and improvement; but such employment will not relieve from the necessity of establishing residence nor excuse the entryman's failure in that respect.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 17, 1906.* (A. W. P.)

Separate appeals have been filed on behalf of Peter Dahlquist and James Cotter from your office decision of June 23, 1905, wherein you reverse the action of the local officers in dismissing Peter Dahlquist's contest against James Cotter's homestead entry No. 3432, made January 29, 1900, for the SW. $\frac{1}{4}$ of Sec. 9, T. 161, R. 91, Minot, North Dakota, land district, but, because of the evident misapprehension under which counsel for claimant, as well as the local officers, labored in the treatment of the case, you remanded the same to afford the claimant opportunity to submit evidence in support of his entry, with like opportunity to contestant to submit rebuttal evidence.

On behalf of Dahlquist it is urged, in substance, that error was committed in ordering such further hearing, the entryman not having requested same; while on behalf of claimant it is contended that you erred in reversing the action of the local officers dismissing the contest; in ordering a further hearing; and in holding that he was called upon under the notice of contest served therein to defend against the charge of never having established a residence on the tract involved.

In conclusion, it is also urged, that final judgment be rendered on the record as presented.

Upon careful examination of the record the Department finds that the material facts in this case, as well as the law applicable thereto, have been fully and very fairly stated in your office decision appealed from, and hence need not be here repeated at length. In view of the manner in which the case was disposed of by the local officers in dismissing the contest on the *ex parte* showing and motion of claimant, the action of your office in remanding the case for further hearing was clearly warranted. In fact, the Department has repeatedly held that where a contest has been erroneously dismissed upon motion of the defendant, your office is without authority to reverse such action and then dispose of the case on prior evidence submitted by the contestant without first affording the entryman an opportunity to present his defense. Inasmuch, however, as claimant declines to avail himself of such opportunity to offer testimony, the case will be adjudicated on the record as presented.

The affidavit filed by Dahlquist, upon which this proceeding was based, charged that the entryman has wholly abandoned said tract; that he has failed to reside thereon since making entry; and that said tract is not settled upon and cultivated by said party as required by law. The notice of contest issuing thereon was as follows:

That said entryman has wholly abandoned said tract; that he has failed to reside thereon for more than six months last past; and that said tract is not settled upon and cultivated by said party as required by law; and that the absence of said entryman is not due to his employment in the U. S. army, navy, or marine corps in time of war.

While the wording of the above notice is slightly different from that of the original affidavit, it charges the entryman with having wholly abandoned said tract, and was sufficient to permit the introduction of contestant's testimony showing claimant's entire failure to establish residence on the land. This testimony is in the form of a general statement of the four witnesses for contestant, subscribed and sworn to before the notary public authorized to take the testimony. Neither claimant nor his counsel appear to have been present at such time, and the affidavit and motion which you set out as being filed on that date seem to have been transmitted to said notary under date of May 2, four days prior to that set for taking the testimony, with the request that he forward the same with his report to the local officers.

Where, as in this case, testimony is authorized to be taken elsewhere than at the local office, neither party should be permitted on the day of hearing to submit further testimony without due notice to the other, and appropriate order therefor made by the local office. Hence, the local officers should not have received and considered

claimant's affidavit and motion thus submitted, nor should any consideration have been given the subsequent *ex parte* affidavit filed on behalf of the contestant.

The Department has repeatedly held that where an entryman has in good faith established and maintained residence on his entry, engagement in public service requiring residence elsewhere will not be construed into an abandonment thereof so long as such efforts are made to maintain improvements as manifest good faith. Such official employment, however, does not excuse a failure to establish such residence, or relieve from the necessity of so doing. And in the face of a contest alleging abandonment and failure to comply with the requirements of the homestead law as to residence and cultivation, such official employment following prior residence must be established by competent testimony, the same as any other evidence offered on behalf of the defendant.

No such showing has been made on behalf of Cotter in this case, though he has been given ample opportunity to present his defense, and considering carefully the testimony regularly submitted before the notary public authorized to receive the same, the Department concurs in the conclusion of your office, as reached in the decision now appealed from, that "the testimony pointedly and positively shows that contestee had never established his residence on the land." The finding of the local officers adverse to the plaintiff appears to have been largely due to the erroneous consideration given the statements contained in the affidavit filed by claimant, and their recommendation based thereon that the contest be dismissed can not therefore be approved.

In view of the conclusion reached herein, your order remanding the case for further hearing is hereby recalled and vacated, and said decision of June 23, 1905, as thus modified is affirmed, and it is directed that the entry be canceled.

PRACTICE—COST OF DEPOSITIONS—ACT OF JANUARY 31, 1903.

DELFELDER *v.* SLATTERY.

The entire cost of depositions taken under and by virtue of the provisions of the act of January 31, 1903, must be paid by the party in whose behalf they are taken.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 19, 1906.* (J. L. McC.)

The Department has before it for consideration the case of John Delfelder *v.* Alva H. Slattery, upon appeal of the latter from your office decision of April 3, 1905, affirming the judgment of the local officers, and holding for cancellation his homestead entry for the E. $\frac{1}{2}$

of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 12 S., R. 6 E., Rapid City land district, South Dakota.

The facts as to the defendant's acts in connection with the land in controversy are fully set forth in your office decision appealed from, and need not be herein repeated. They clearly sustain your conclusion that he never established or maintained residence upon the land.

Another question, however, is raised by the appeal. A part of the testimony in the case is in the shape of certain depositions, taken January 3, 1904, before a United States Commissioner at Chadron, Nebraska, upon the application of the defendant. The latter contends that, under the act of May 14, 1880 (21 Stat., 140), the expense of taking all the testimony in the case should be borne by the contestant. Upon this point the local officers reported to your office (May 27, 1904), in forwarding their report and recommendation:

There was a controversy in regard to who should pay the costs of taking the above deposition; we find that the contestant and contestee each paid for their own testimony in said deposition, which we believe to be in harmony with and according to the act of January 31, 1903, which reads in part as follows: "The fees of the officer taking the deposition shall be the same as those allowed in the State or Territorial courts, and shall be paid by the party taking the deposition."

Before said United States Commissioner the testimony of four witnesses, all introduced by and in behalf of the defendant, was taken (orally). Under the above-quoted ruling of the local officers, "the contestant and contestee each paid for their own testimony"—i. e., for the testimony elicited in response to questions put by the attorney for each respectively; the contestant paid two dollars and fifty cents, and the defendant nine dollars and fifty cents. Your office decision appealed from holds:

Said depositions were given only by witnesses for the defendant, and included all their testimony on direct and cross-examination. In view of these facts, and of the further fact that the proceeding in question was had under the provisions of said act of January 31, 1903, the entire cost of the depositions was taxable to the defendant. Said act expressly requires that the costs of any depositions procured thereunder shall be paid by the party taking them. . . . The defendant's appeal in the case effectually admits that the proceedings were under said act, but urges that its provisions do not relieve the contestant from ultimate payment of all the costs. Said act, in addition to its general provision for compulsory attendance of witnesses in matters requiring a hearing before local offices, provides a special method for obtaining testimony desired for use in such cases by any party litigant. This method is independent of and additional to the one already afforded by Rules 23 to 27 of Practice. It is not exclusive in its operation, and may be invoked, under proper circumstances, at the party's option. It is collateral to a trial had before the local office, or under Rule 35, in the same general sense as is the method provided by said Rules 23 to 27, though differing therefrom in certain particulars, conspicuous among which is the fact that the testimony or depositions need not be taken on written interrogatories. That said act intended the costs of any depositions taken thereunder to be borne

by the party in whose behalf the same are taken is manifested by its express language.

From this decision the defendant has appealed, contending that your office erred—

In holding that this contestee should pay any part of the expense of the taking of the depositions of his witnesses, it being the legal duty of said contestant to pay all the costs of his contest.

In holding that, by the act of January 31, 1903, this contestee was required to pay any part or portion of the cost of his depositions, except in the first instance, and then to be repaid by said contestant before being allowed to proceed with his contest.

There are other allegations, presenting substantially the same contentions in somewhat different language.

The above ruling of your office undoubtedly expresses the meaning and intent of said act of January 31, 1903 (32 Stat., 790; also Circular of March 20, 1903—32 L. D., 132), wherein said act provides that the fees of the officer before whom a deposition is taken “shall be paid by the party taking the deposition.” This conclusion is strongly reinforced by the further language of the act—immediately following that above quoted:

That whenever the taking of any depositions taken in pursuance of the foregoing provisions of this act is concluded, the opposite party may proceed at once, at his own expense—

not to cross-examine the witnesses introduced by the opposite party, but—

to take depositions in his own behalf, at the same time and place, and before the same officer.

As the cross-examination is an integral part of the testimony given by a witness in his deposition, it follows that when the law requires the cost of the deposition to be paid by the party taking the deposition, it unquestionably means the cost of the whole deposition—both on direct and cross-examination.

The first section of said act sets forth that the same is applicable, “in all matters requiring a hearing before” the local officers. It can not be presumed that the legislative mind was ignorant or forgetful of the fact that among the most important “matters requiring a hearing” before local officers are contest cases; and if it had been the intention that in such cases the expenses paid by the contestee under sections 4 and 5 of said act should be repaid to the contestee by the contestant before being allowed to proceed with his contest, a provision to that effect would have been embodied in the act. The Department has no authority to import into said act any language or provision which it does not contain.

Said act (of January 31, 1903, *supra*) is to be regarded as providing an additional and special means of procuring testimony. Its employment is entirely a matter of election on the part of either party to the case. The party, whether contestant or contestee, employing the means

provided by this act to secure testimony, must of necessity observe the requirements of the law as to payment of costs thereunder. Said act and the act of May 14, 1880, are not necessarily inconsistent with each other, when it is remembered that the recent law is a specific provision left to the choice of either party, and for that reason does not seem to have any effect upon section 2 of the act of May 20, 1880, in so far as the payment of land office fees is concerned. In other words, it may be considered as being in effect amendatory of and supplemental to said act of 1880, and to that extent makes an exception to the general rule that all the land office fees must be paid by the contestant in order that he may acquire preference right under the act of 1880.

The decision of your office was correct, and is hereby affirmed.

MINING CLAIM—ADVERSE PROCEEDINGS—LODE WITHIN PLACER.

THE CLIPPER MINING CO. *v.* THE ELI MINING AND LAND CO. ET AL.
(ON REVIEW.)

The general principle of the exclusive judicial cognizance of controversies involving the right of possession as between rival mineral claimants and the binding force of a court's award in such a case has in view a possessory right which is the essential basis of, and which may ultimately ripen into, the legal title obtainable from the government under the mining laws; but it necessarily remains for the land department, in the exercise of its jurisdiction and in the discharge of its duty, to determine in any such case the force and effect as against the United States of the possessory right so awarded by the court.

Where a placer adverse claimant, on the strength of his placer location, prevails in a suit under section 2326, Revised Statutes, against an applicant for patent to lode claims within the placer limits, and the placer location should thereafter be found by the land department, in the exercise of its jurisdiction, to embrace non-placer land, the possessory right so awarded would fail as a basis of title to the portion of the placer location in controversy and equally to the lodes therein embraced, and would fall short of that effective basic right essential to the foreclosure of any purely lode rights in the patent applicant; and the latter would have suffered no prejudice by reason of the judgment of the court.

Having prevailed in the adverse suit solely by virtue of his placer location, any additional rights which the successful adverse claimant might set up under subsequent lode locations by him of the ground in controversy would be wholly independent of the court's award.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) January 22, 1906. (F. H. B.)

A motion for review of departmental decision of June 27, 1905 (33 L. D., 660), in the above-entitled case, filed by The Eli Mining and Land Company *et al.*, was entertained by the Department upon the

usual conditions as to service thereof, etc., and has since matured. The case is stated in that decision.

The motion challenges the second or concluding division of the decision in question. Upon the merits of that portion of the case briefs have again been filed on behalf of the contending parties, and opposing counsel have again been heard in oral argument. For convenience and brevity the designation of the parties, The Clipper Mining Company and The Eli Mining and Land Company *et al.*, as "petitioner" and "respondents," respectively, observed in the decision under review, will be followed here.

Complaining of that decision, counsel for respondents set out four assignments of error, the first being in part closely allied to the second and in part to the third and fourth, the latter two presenting in different aspects substantially the same question. From the sequence and arrangement of these assignments it will be convenient to depart somewhat.

The primary error, it is argued, lies in according any further recognition to petitioner's application for lode patent, and to petitioner thereunder, since the final judgment in the adverse suit between the parties. Counsel contend that by the legal effect of that judgment the right of petitioner to press its application or to receive patent under it has ceased; and they deny the jurisdiction of the land department to treat that application as now in any proper or legal sense before it.

It is conceded by them that when an adverse claimant who has prevailed in an action pursuant to section 2326, Revised Statutes, presents his judgment roll and asks for patent the land department may inquire as to his compliance with the law in respect of any matter *aliunde* and as to the character of the land involved, but it is insisted that all proceedings following the judgment are *ex parte* and that the defeated applicant can not thereafter properly be recognized or heard as an actor upon the assumption that his former application has any further existence in fact or law or can be made the basis of any patent proceeding in his behalf. The basis for this conclusion, it is argued, is that the "right of possession," thus awarded to his adversary, is the foundation of and indispensable prerequisite to the paramount title under the mining laws.

Concerning the judgments which may be rendered by the courts the following extract from Lindley on Mines (2nd Ed., Vol. II, Sec. 765, p. 1370) is cited by counsel:

The trial of the action may result in one of four judgments: (a) in favor of plaintiff, the adverse claimant; (b) in favor of the defendant, the patent applicant; (c) adjudging that neither party has complied with the law; and (d) dividing the conflict area between the parties.

And with respect to the effect of a judgment in favor of the adverse claimant, who thereafter presents his judgment roll, etc., and

asks for patent to the tract in controversy, the following is cited (*Ibid.*, p. 1373) :

The Department will thereupon proceed to investigate the character of the land, the proofs submitted, and the compliance by the adverse claimant with the requirements of the law. So far as the premises thus applied for are involved, the former patent applicant is eliminated from the proceeding, and thereafter the matter rests between the government and the adverse claimant.

Counsel also repeat certain expressions in that treatise and in the case of *Richmond Mining Co. v. Rose* (114 U. S., 576) in recognition of the binding force of the judgment upon the land department, as well as an expression in the case of *Alice Placer Mine* (4 L. D., 314, 317), that "the judgment of the court ended the contest between the parties and determined the right of possession."

Passing to the consideration of these contentions, the Department recognizes and reaffirms to its fullest extent the general principle, so often declared by the courts and the Department, that "the question of the right of possession" as between contending mineral claimants is exclusively of judicial cognizance, and that the award of that right by a court of competent jurisdiction is binding upon the parties and the land department. In the final analysis, however, this principle has always in view the "right of possession" which is the essential basis of the legal title obtainable under the mining laws, as counsel for respondents affirm it to be. That the principle contemplates, as the subject of judicial disposition, a right of possession which shall thereafter be found by the land department, in the exercise of its jurisdiction, to be effective for patent purposes is manifest from the provisions of section 2326 whereunder the adjudged right may, upon submission of the judgment roll and "without giving further notice," be made the basis of the paramount title. See, in this connection, *Gwillim v. Donnellan* (115 U. S., 45, 50-1).

The court determines only the question of the right of possession as between the litigating parties—that one has acquired by virtue of his mining location a right of possession which entitles him to prevail against the other, or that neither has established such right. It can not by its judgment establish in either a right of possession of binding force and effect as against the United States, since the government is not a party to the suit and a right thus effective depends finally upon the character of the land involved. *Perego v. Dodge* (163 U. S., 160, 168). In a judicial controversy pursuant to section 2326 the court necessarily takes for granted the mineral character of the land, upon which both parties rely and which is a question ultimately and exclusively within the jurisdiction of the land department. It must be considered, therefore, that the court assumes the right of possession which it awards to be such as may ripen into the legal title in accordance with the provisions of that section of the stat-

utes—a right of possession of mineral land, lode or placer as the case may be, within the meaning of the mining laws.

In the case at bar a lode applicant, the present petitioner, was confronted by placer claimants, the respondents. Relying wholly upon their placer location the latter prosecuted their adverse proceedings against the lode application, averring that no lodes were known to exist within the placer limits at the date of the placer location or had been discovered at the time the adverse proceedings were commenced, and opposing their claimed placer possessory right to petitioner's claimed lode possessory right. The court found "from the evidence that the Searl placer was duly located, as required by the law, in 1877" and that the prescribed annual labor had continuously been performed to the time of trial. The court also found that the lodes involved were discovered after the date of the placer location. Because of the invasion of the placer location, as valid in its inception and uninterruptedly maintained by performance of annual labor, the court awarded the right of possession not of the lodes or lode claims but of the ground in controversy, as part and parcel of the placer claim, to respondents. And only as incident to their placer location, upon which respondents stood solely and squarely before the court, could they take those lodes under the proceedings thus had.

With these considerations in view it follows that the integrity of the general principle is not assailed in the decision under review, as counsel contend. Under no circumstances can the land department undertake to determine the question of the right of possession as between opposing mineral claimants—that controversy must be heard in the courts. As before pointed out, however, there remains in every case for determination by the land department the force and effect of the right of possession (awarded by the court to one or the other) as against the United States. And in the process of this jurisdiction this case is distinguishable from the usual cases merely in the result which may follow the establishment of the non-placer character, for patent purposes, of the land embraced in the placer location, if that be the fact. This distinction, which the Department sought to make clear in the decision under review, rests upon the difference in origin of the possessory claims litigated before the court, arising out of locations of wholly unlike character, and which do not present the immediately antagonistic aspect of locations of the same species irrespective of the actual character of the land. The placer right of possession awarded to respondents would in the event suggested prove to fall short of that possessory right which is the essential basis of the legal title under the mining laws and within the court's contemplation in recognition of it in bar of petitioner's lode-patent application. Failing thus as a basis of title to the portion of the placer location in controversy, it would equally fail as a basis of title to

the lodes therein embraced. And, failing as an available basis of title to those lodes, it would fall short of that effective basic right essential to the foreclosure of any purely lode rights in the petitioner. In such a case, therefore, it can not be held that the unsuccessful litigant has been "eliminated from the proceeding" by the judgment of the court.

Nothing inconsistent with these views is contained in the case of *Richmond Mining Co. v. Rose* or of *Alice Placer Mine, supra*, cited by counsel, and in both of which judicial awards of the right of possession were considered. The first of these, pursuant to section 2326, was a controversy between lode claimants—the immediate effect of a judgment in such a case being clear—and involved principally the question of the right of the officers of the land department to resume active control of patent proceedings and issue patent thereunder during the pendency of the suit in court upon their own determination of a waiver of the adverse claim because of delay in the judicial proceedings. In the second case an applicant for placer patent had prevailed in court against an adverse lode claimant, who pressed no further claim, and the only question before the Department was as to the authority of your office to order a hearing, following the judgment of the court in the applicant's favor, to determine the placer character of the land. As was pointed out in the decision here under review, the Supreme Court of the United States, in its decision in this case and in considering the effect of the judgment below, had clearly in view the inseparable question of the character of the land as affecting the ultimate result and the recognition which might yet thereafter be accorded petitioner by the land department, as the language of that decision discloses.

As conclusive upon petitioner in the premises, and to support their contention that it was error to order a hearing upon the present record to determine the placer patentability of the land, since respondents' adverse claim had been recognized by the Department and by the courts and "was founded upon a placer mining location which the courts have declared was a valid location both in fact and in law," counsel cite the following expressions in the case of *Belk v. Meagher* (104 U. S., 279, 283, 284):

A mining claim perfected under the law is property in the highest sense of that term. . . .

* * * * *

Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done.

And in *Gwillim v. Donnellan* (115 U. S., 45, 49):

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of

a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second.

Coupled with a contention raised in this as in a preceding connection, that petitioner's patent application became defunct by reason of the judgment of the court and that it was error to treat it as a basis for the order for hearing, is the contention in this same behalf that inasmuch as the placer location has been adjudged to have been valid and subsisting at the date of the lode locations the latter, under the principle laid down by the Supreme Court as above, were wholly void and no rights thereunder could accrue to petitioner. Neither contention is tenable in the view taken by the Department. Certainly, those judicial expressions are not susceptible of reduction to a doctrine that a valid and subsisting mining location, however completely within all the provisions and requirements of the mining laws, constitutes an insuperable barrier to the acquisition by another of rights, present or prospective, under a subsequent location upon the same ground. If they were so susceptible, and could be taken in the literal sense which might be attached to them apart from the facts to which they were addressed, it would unavoidably follow that a junior locator of land embraced in a valid and subsisting location who should duly and regularly prosecute patent proceedings therefor and without opposition by way of an adverse claim would nevertheless take nothing by his proceedings, notwithstanding the statutory assumption in his behalf of the absence of an adverse claim; for it is axiomatic that no validity can be infused into a "void" thing. Obviously, the assumption which negatives the existence of adverse claims has its predicate in the proceedings upon the application for patent and is for their benefit.

The doctrine thus announced by the court, more especially in *Belk v. Meagher*, seems more or less generally to have been given an extreme or literal interpretation. Since its operation was not involved in either case, the court had no occasion to consider that significant provision of the mining laws which compels the arbitrary and indisputable assumption, in favor of an applicant under the requisite proceedings to secure mineral patent, of the absence of adverse claims when none has been filed, or its equivalent in the waiver of an adverse claim for failure to prosecute it, and whereunder valid and vested possessory rights under a senior location may be wholly avoided and become as if they had never been. The court itself has made it clear that the extreme or literal interpretation of the language quoted from the opinions in those cases, standing alone, can not be accepted. In the later case of *Del Monte Mining Co. v. Last Chance Mining Co.* (171 U. S., 55), after referring to those cases as going no further than

to establish the general doctrine that a second location is ineffectual to appropriate land covered by a prior subsisting and valid location, the court held, among other things, that for certain essential purposes the lines of a junior location may be laid within, upon or across the surface of a valid senior location; and that, as it is not provided by the statute or contemplated that judicial proceedings to establish the invalidity or failure of a prior location shall precede the right to make a later one, a junior locator is at liberty to make his location at once, and thereafter, in the manner provided by the statute, litigate, if necessary, the question of the validity of the earlier as well as of his own location.

Belk v. Meagher was a simple action in ejectment, involving no application for patent and brought independently of section 2326, Revised Statutes. In *Gwillim v. Donnellan* the junior locator and applicant for patent prevailed against the senior locator and adverse claimant by reason of the fact that the latter had theretofore permitted a partial conflict with his location and embracing his discovery shaft to pass by patent to a third person. The restricted application of the doctrine of the *Belk-Meagher* case is apparent upon comparison with the recent case of *Lavagnino v. Uhlig* (198 U. S., 443), involving an essentially similar state of facts but which arose under section 2326. In the latter case the claims embraced in the application for patent had been located in part upon what was then a valid and subsisting location, known as the Levi P. claim, which the adverse claimant alleged to have become afterwards forfeited and to have been thereupon relocated by him pursuant to the appropriate provisions of section 2324, Revised Statutes. The Supreme Court, concurring in the judgments below, sustained the applicants for patent substantially and in effect upon the ground that, by reason of the absence of an adverse claim on behalf of the Levi P. claim, the statutory assumption effectually negated as to it any bar to the acquisition by the applicants of the rights essential to them in the premises (and this, it was held, would undeniably have resulted had the patent proceedings been prosecuted under like circumstances prior to forfeiture of the Levi P. location), and left for consideration only the relocation by the adverse claimant, subsequent in time and therefore of no avail as against the applicants. Indeed, a right of possession duly awarded under a judgment pursuant to section 2326 in a suit involving locations of any character, even such a possessory right as would be found to be effective for all purposes, may equally thereafter be avoided, where upon termination of the litigation (which, after all, is but a step in the particular patent proceedings and is merely in aid of the land department—163 U. S., 167) the successful party fails or neglects to secure patent under his judgment roll and patent proceedings *de novo* become the only remaining recourse. In

that event the unsuccessful litigant in the former proceedings may file the new application, against which his former adversary must oppose his adverse claim and duly support it by a suit in court or abide the indisputable assumption of the absence or waiver of an adverse claim.

It is obvious, therefore, that a location embracing a prior valid and subsisting location is not *ipso facto* void and ineffectual, but if unopposed may properly thereafter become the subject of mineral patent. Thus, a valid and subsisting location will in no case avail to defeat a junior location, as to which patent proceedings are regularly prosecuted, except upon the invocation of judicial intervention, and equally a placer location, notwithstanding a favorable judgment of a court, will not avail to defeat a lode location within the placer limits if those limits be thereafter found by the land department to embrace a tract which is not patentably placer in character. A location which the courts will recognize as valid may be predicated upon a discovery of mineral which would fall short of establishing the mineral character of the land under the settled and approved rule of determination; but to prevail eventually the location must be shown to embrace mineral land of corresponding character, lode or placer, which may become the subject of mineral patent.

Commenting upon the doctrine of rights arising under a valid location, as applied by the several courts in this case, counsel for respondents sum up the situation presented here, in the following clear and concise statement contained in their brief:

The effect of this judgment, thus affirmed, under the clear language of section 2326 leaves to the adverse claimants as the successful litigants the privilege of appearing with this judgment roll in the United States land department and making thereon the statutory proof and payment and receiving patent.

The soundness of this conclusion the Department readily affirms. But the conclusion suggests in itself the pertinent question: What proof would be required? And in the answer, proof of the patentably placer character of respondents' claim must be included. Should that proof fail, respondents' rights under their judgment roll would fail.

Under the circumstances of the case and the foregoing views it can not be held that petitioner's patent application became defunct by reason of the judgment of the court and is an improper basis for the order for hearing. That application was the cause of the controversy which had ultimately in view the right to patent and which now presents the question of respondents' rights under their judgment roll as dependent upon the character of the land. Should the result of the hearing be favorable to respondents it would dispose of petitioner's application; should it be unfavorable, a new application by it would merely invite circuitry of action.

Whilst opposing a hearing to determine this question at the instance of petitioner, counsel for respondents concede that, as a logical result of the filing of an adverse claim and the assertion therein of prior right of possession and consequent prior right to acquire the fee from the United States, the land department might treat the adverse claim as an application for patent and cite the claimant to show cause why it "should not be canceled," a concession which, strangely, counsel for petitioner question. Any such connecting link between a mining location and the land department may afford warrant for an investigation of any and all rights against the government to which claim is therein laid, and this may always be had at the instance of the land department itself, or of one asserting any interest in the land, or even of an entire stranger. And if the claimed rights be negatived as the result of the inquiry and determination, the land may thereafter be otherwise disposed of as the facts are found to warrant.

As of the date of petitioner's application for lode patent, out of which the controversy arose, and at which time the petitioner submitted to the land department its claim to the land involved, the question of the character of the land embraced in the placer location must be determined. Did it appear, as in *Michie v. Gothberg* (30 L. D., 407), that sufficient time within which to develop the claim had not then elapsed a further period would be afforded, but at that date the placer location had stood for almost sixteen years and came wholly within the purview of the correlative case of *Purtle v. Steffee* (31 L. D., 400).

But counsel for respondents cite an expression of the United States Supreme Court in this case (194 U. S., 220, 223) as follows:

Undoubtedly when the Department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain.

Mutual reliance upon this utterance seems to be had. Counsel for respondents interpret it to mean that the placer location, the validity and priority of which have been adjudged, operates to withhold the land within its limits from other appropriation, and that only when the land department, upon its own initiative and independent action, shall by direct proceedings and upon notice set the placer location aside "and restore the land to the public domain" will unfettered jurisdiction to entertain the first legal application vest. Emphasis and stress are laid upon the concluding clause of the quotation.

The Department finds no difficulty here and no obstacle opposed to the course outlined in the decision under review. The question of the force and effect of a mining location of itself to preclude or defeat a subsequent location by another is sufficiently discussed above, and

no contrary opinion is expressed by the court in this connection. And whilst the court must be well aware that a mining *location* is not of record before or connected with the land department, and is not so connected or usually within the latter's knowledge until application for patent is filed or it is properly called in question by another, the court must be equally well aware that these locations are constantly in legal and practical effect set aside and annulled by the issuance of patent to another after proper proceedings involving the question of the character of the land or other sufficient question within the jurisdiction of the land department, upon notice to the locator and opportunity afforded him to be heard. Nor does the court say that the land department must formally "restore the land to the public domain" before other disposition can be made of it, nor would that course be practicable or necessary: the tract is subject to other and final disposition the instant its present unavailability to the mineral locator is determined. These customary proceedings before the land department must therefore be the "direct proceedings upon notice" which the court had in contemplation.

In connection with respondents' motion for review an additional question is presented in the record. It is stated that since the judgment of the court in the case and while respondents were in possession of the premises by virtue thereof their development of the ground disclosed the existence of genuine lodes, which are now embraced in and held under lode locations by them or those in privity with them. In fact, proof of such further locations is submitted on behalf of petitioner, the date of discovery of the lodes and their existence within the knowledge of respondents being made a subject of dispute. Urging that "the actual possession and right of possession which" respondents enjoy is predicated upon the final judgment of the court, it is contended that if they are not entitled to placer patent at present they are clearly entitled to hold the ground under these lode locations as against all the world, and that as against petitioner the question of right of possession has become *res adjudicata*.

With these contentions the Department is unable to agree. Again it may be pointed out that the only possessory right which the trial court awarded, and which under the issue it could have awarded to respondents, was a placer right of possession; and any additional rights which might arise under the later lode locations would be wholly independent of the award. The only adverse claim opposed to petitioner's patent application was the placer adverse of respondents, and except as to it petitioner became entitled, upon the expiration of the period of publication of notice of its application, to the benefit of the statutory assumption that no adverse claim existed. These lode locations thereafter made, on behalf of respondents and their privies, could, aside from other considerations, be of no avail as

against any claim under petitioner's patent proceedings; and the judgment of the court could not have the effect to foreclose or defeat any rights adverse to such as might be asserted under the recent lode locations, now set up by respondents, apart from the placer claim.

Finally, counsel urge that the Department erred in holding that if the land embraced in the placer location is found to be non-placer in the patentable sense, etc., no obstruction to the completion of petitioner's patent proceedings, "if in themselves regular, would then remain." To support this assignment they now call in question any discovery of the lodes upon which the petitioner relies until long after its patent application was filed. Reference is made by them to certain affidavits in respondents' behalf and to statements by petitioner's witnesses and counsel, appearing in the record of the judicial proceedings of the case, as tending to establish an absence of earlier lode discoveries.

On the other hand, counsel for petitioner have, since the motion for review was entertained, filed in the Department a motion to rescind the order for hearing in the decision under review and to issue patents to petitioner under its lode application. On behalf of their motion counsel for petitioner, in their turn, refer to what are conceived to be admissions of the "known existence" of the lodes long prior to petitioner's lode locations.

It is needless here to cite the particular matters now so pointed out by opposing counsel as bearing upon the time at which these lodes were discovered and their existence established. It is sufficient to say that in the records of the several judicial proceedings heretofore had this time is variously stated; and it may be added that the specific admission by counsel for respondents of the lode character of the ground in controversy, referred to by opposing counsel and quoted in the decision under review, was made at and as of a very recent time and does not concede any lode discovery by or on behalf of petitioner at any time. Certainly, the Department did not intend, in the decision under review, notwithstanding any apparently contrary expression, to adjudge any right in petitioner to receive patent if the placer location should be found to embrace non-placer land, any such question being regularly cognizable by the local officers and your office before its consideration here. Upon the record then before it, however, the Department understood no question to be raised as to discovery of these lodes by petitioner or its grantors at the time of its locations, as claimed by it.

The only finding by the trial court in this behalf was that the lodes were discovered by petitioner's grantors after the date of the placer location. Their discovery may have occurred, therefore, at any time between that date and the trial of the cause; and the award of the court, under the issues raised and findings made, leaves to the land

department the determination of this question. See *Aurora Lode v. Bulger Hill and Nugget Gulch Placer* (23 L. D., 95). Manifestly, if these lodes were not discovered until long after petitioner's patent application was filed, as now claimed, it can take nothing by its proceedings thereunder, and the application must in that event be rejected. And the controverted question can not be determined from the records containing the evidence at various times adduced before the State and Federal courts, in the several controversies involving portions of the placer location, or from *ex parte* affidavits or exhibits, but only after hearing regularly had before the local office at which full opportunity has been afforded both sides for submission of such evidence as they may have and for cross-examination of the opposing witnesses. Besides these considerations, no admission of the non-placer character of the land embraced in their location has been made by respondents; and the motion for rescission of the pending order for hearing is denied.

Upon application by respondents to your office, within a reasonable time, the hearing heretofore ordered will be broadened to include the question of the date of discovery of the lodes embraced in the land in controversy.

For the reasons above given the Department adheres to the decision under review; and the record is returned for such proceedings and action in the case as may appropriately be had in accordance with the foregoing views and directions.

INDIAN LANDS—LIQUOR CLAUSE IN DEEDS BY HEIRS OF DECEASED ALLOTTEES.

OPINION.

Opinion expressed that the "liquor clause" now inserted in deeds by heirs of deceased Indian allottees, prohibiting the sale or storage of liquor on the land conveyed, and providing for a reversion of title in case of violation of the prohibition, should be modified by a further provision "that the rights of mortgagees in good faith, their heirs and assigns, shall not be voided or jeopardized by such reversion.

Assistant Attorney-General Campbell to the Secretary of the Interior,
January 25, 1906. (W. C. P.)

You have referred for my consideration, in connection with a reference of December 8, 1905, a letter of the Commissioner of Indian Affairs reporting on a communication of L. W. Clapp suggesting certain modifications in the clause to be inserted in deeds by heirs of deceased Indian allottees respecting the sale of liquor on the premises conveyed. In his report the Commissioner says that the clause in

question was prepared by "the law officers of the Department" upon recommendation of his office.

When a deed from an heir of a Winnebago allottee for land which the purchaser intended to use for a townsite was presented for your approval, this office was informally asked whether a clause prohibiting the sale of liquor on the land to be conveyed, could be sustained. It was found that the Supreme Court of Nebraska, in which State the lands affected by the proposed deed are situated, in the case of *Jetter v. Lyon*, decided December 2, 1903 (97 Northwestern Rep., 596), had held such a condition valid and enforceable. It was concluded, and the question so informally answered, that such a clause in the proposed deed would in all probability be sustained in the State of Nebraska. It was then asked to formulate a clause, and did so, adopting in substance the clause in the deed that was before the court in that case. The form as adopted reads as follows:

That no malt, spirituous, or vinous liquors shall be kept nor disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under said party of the second part, shall render the conveyance void and cause the premises to revert to the party of the first part, his heirs and assigns.

By letter of November 21, 1905, to the Commissioner of Indian Affairs, the Department directed that this clause be inserted in all deeds by heirs of deceased Indian allottees. Afterward the grantee in the deed which brought up for consideration this question, suggested that the clause be modified by limiting the forfeiture to the particular lot or tract upon which liquor was kept or disposed of, and upon reference of that suggestion to this office it was advised in opinion of November 17, 1905, that the modification suggested be not made.

It is now suggested that a proviso be added to the clause as follows: "*And provided further*, That the rights of mortgagees in good faith, their heirs, and assigns, shall not be voided or jeopardized by such reversion." It is stated that before the clause in question was inserted in these deeds loans could be made with the land as security, but that without some modification of the provision "no life insurance company or other careful investor would lend a dollar at any time in the future upon any land held under a deed or title containing a provision that rendered the deed absolutely void as to the grantee and all persons acquiring rights under him, in case any of such persons should violate this liquor clause."

The Indian Office suggests that the clause, if thus modified, might be used to defeat the object sought to be attained by the original clause, and by way of illustration suggests, (1) that if a mortgage should be placed on a tract held under such a deed, the mortgage foreclosed and title acquired by virtue of the sale thereunder, the

purchaser under such sale might be relieved of the condition, (2) that the purchaser from the Indian might mortgage the land for a sum nearly equal to its full value and upon violation of the condition the title would not revert to the Indian until he had paid and discharged the incumbrance.

It is believed that the first of these suggestions is not entitled to great consideration. A purchaser at a sale under foreclosure of a mortgage of a tract of land affected by this clause would be a person claiming rights under the original grantee of the Indian. At any rate, instances of sales under foreclosures would be so infrequent as to constitute a negligible factor in determining the course to be pursued. The second suggestion contemplates a condition that may be presented at any time though not probably exactly as the Indian Office puts it. Mortgages will be placed on these lands, at least if the proposed modification be adopted, and whether the amount of such an incumbrance be large or small the reversion of the title, if the amendment suggested be adopted, would become effective only upon the payment by the Indian of the amount of the incumbrance. This would, in most instances, constitute a barrier to the effectual and complete reversion of title. The Indian would, as a rule, be unable to discharge the incumbrance and the final lodgment of the title would be largely in the control of the mortgagee. This would no doubt open the way for secret dealings between the mortgagor and mortgagee with a view to defeat of the liquor clause. It is quite improbable that such cases will be presented so frequently as to constitute a grave objection to the proposed amendment. Holders of these lands will not generally resort to any such proceeding for the purpose of defeating the inhibitory clause. The practical operation of the clause will be to depreciate the price of these lands and any modification that will remove any part of the objections thereto will benefit the Indian holder. Whether the objections to the incorporation of the amendment are sufficient to cause its rejection in the face of the assertions of disadvantage to the Indian that would grow out of the retention of the clause in its original form, can not in the nature of things be definitely determined. The actual results are problematical. I am inclined to the opinion, however, that the disadvantages to the individual Indian growing out of the clause in its original form, especially where the lands affected are agricultural, will be greater than the difficulties that will be presented if the modification be adopted.

Approved:

E. A. HITCHCOCK, *Secretary*.

YANKTON INDIAN RESERVATION—LIQUOR CLAUSE IN DEEDS—ACT OF AUGUST 15, 1894.

OPINION.

Opinion expressed that it is inadvisable to insert in deeds by heirs of deceased allottees in the Yankton Indian reservation the "liquor clause," prohibiting the sale or storage of liquor on the land conveyed and providing for a reversion of title in case of violation of the prohibition, the agreement with the Yankton Indians and the provisions of the act of August 15, 1894, ratifying the same, being the proper authority which should be invoked for the protection of the Indians in that respect.

Assistant Attorney-General Campbell to the Secretary of the Interior
January 25, 1906. (W. C. P.)

In his letter of December 7, 1905, the Commissioner of Indian Affairs says that he has informally received a protest from residents upon the Yankton Indian reservation, South Dakota, against the clause prohibiting the sale of liquor being inserted in deeds for lands within that reservation, made under sales by heirs of deceased allottees, and submits the matter for instruction. This letter has been referred to me for opinion upon the matter therein presented.

The clause protested against is:

Provided that no malt, spirituous or vinous liquors shall be kept nor disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under said party of the second part, shall render the conveyance void and cause the premises to revert to the party of the first part, his heirs and assigns.

It is insisted that the provision in the agreement with the Yankton tribe of Sioux or Dakota Indians on the Yankton reservation ceding these lands and of the act of Congress approved August 15, 1894 (28 Stat., 286), ratifying said agreement, amply provides for the situation so far at least as that reservation is concerned. The provision in the agreement (page 318) is as follows:

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterward surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

The provision in the ratifying act (page 319) is:

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Submitting the matter the Commissioner says:

I shall be glad to be instructed by an opinion from the law officers of your Department whether, after a parcel of land had passed entirely out of Indian ownership and become subject to taxation by, and all other jurisdiction of, the State of South Dakota, an act of Congress providing for the punishment of an offense committed on that land could be successfully enforced.

I am not informed whether the effectiveness of the provision against the sale of liquor within the boundaries of the former reservation has been tested in the courts.

Article 7 of the treaty with the Red Lake and Pembina band of Chippewa Indians of May 5, 1864 (13 Stat., 668), provides:

The laws of the United States now in force or that may hereafter be enacted prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States.

The validity of this provision was before the Supreme Court in *United States v. 43 Gallons of Whiskey* (93 U. S., 188). The power of Congress to make this provision was fully sustained. Speaking of it the court said (page 197):

This stipulation was not only reasonable in itself but was justly due from a strong government to a weak people it had engaged to protect.

It further said (page 197):

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can be thus obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

When the case came before the Supreme Court again (*United States v. 43 Gallons of Whiskey*, 108 U. S., 491, 494), the authority of the United States to make the provision there in question was more clearly asserted, as follows:

Several important legal and constitutional questions were raised on the argument here, and it was held that Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the introduction and sale of spirituous liquors in the Indian country, but extend such prohibition to territory in proximity to that occupied by Indians; that it is competent for the United States, in the exercise of the treaty-making power, to stipulate in a treaty with an Indian tribe that within the territory thereby ceded the laws of the United States, then and thereafter enacted, prohibiting

the introduction and sale of spirituous liquors in Indian country, shall be in full force and effect until otherwise directed by Congress or the President of the United States, and that a stipulation to that effect will operate *proprio vigore*, and be binding upon the courts, although the ceded territory is situated within an organized county of a State. These conclusions are stated in a very clear and able opinion by Mr. Justice Davis, *United States v. 43 Gallons of Whiskey*, 93 U. S., 188.

A question arose as to the power to prevent the sale of liquor in the town of Odenah, Wisconsin, located within the boundaries of Bad River Indian reservation and was submitted to this office for opinion. The provision affecting that land, found in the treaty of September 30, 1854 (10 Stat., 1109), is:

No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians and the sale of the same shall be prohibited in the territory hereby ceded until otherwise ordered by the President.

By the same treaty certain missionaries, teachers, and other persons residing in the territory ceded or upon the reservations made therein, were allowed to enter the land occupied by them. Certain tracts were entered under this provision and patents issued therefor. Some of the lands so entered were sold and it was upon such a tract that the saloons complained of were being conducted, the owners claiming that the land was not a part of the reservation and that the United States had no control over it. In the opinion of August 10, 1900, it was held that the sale of liquor upon such tracts was contrary to the law. The clause construed by the court is substantially the same as the provision in the Yankton agreement and ratifying act and the case cited would justify the conclusion that the latter provision would be upheld and declared effective to prevent the sale of liquor upon any of these lands. While in *Matter of Heff* (197 U. S., 488), the Supreme Court holds that police regulations respecting the persons of Indians who have become citizens fall within the domain of state jurisdiction, nothing said there can be held as overruling the decision in *United States v. Forty-three Gallons of Whiskey*, *supra*, or of denying the declarations there made as to the authority of Congress to make a provision prohibiting sale of liquor upon lands allotted to and ceded by the Indians. Until the court has made some declaration to the contrary this Department should go upon the theory that the act of August 15, 1894, was within the power of Congress and can be enforced.

The Commissioner of Indian Affairs says: "My own opinion, for whatever it may be worth, is that no punishment by fine and imprisonment would have the same deterrent effect in any event as a forfeiture of title." It should be remembered, however, that the clause in question would prevent sales on only a comparatively small portion of

the lands formerly within the Yankton reservation; that is, only on tracts sold by heirs of deceased allottees. The allotments to Indians cover only a portion of the reservation, the remainder being open to settlement and entry by whites. Only a portion of the allotted lands will be subject to sale as inherited lands under the act of May 27, 1902 (32 Stat., 245, 275). Tracts entered under the law providing for the disposal of unallotted lands, and tracts conveyed by allottees after removal of restrictions on alienation by issue of patents in fee or otherwise, would not be affected by the clause in the deeds for inherited land; in other words, the provision in the law attaches to all the land while the clause in the deed would attach to only a comparatively small portion. It is doubtful whether, if the clause be inserted in these deeds, it will of itself give any large degree of protection against the evil aimed at. To prevent sales upon one tract while the traffic may be carried on without let or hindrance upon an adjacent tract, would not prove of great benefit to the body of the Indians. Real protection to the Yanktons must be found in the law as it now stands or in some provision to be hereafter enacted affecting the whole body of these lands.

Any condition imposed will naturally diminish the chances of sales and depreciate the price to be obtained by the heirs of deceased Indian allottees for their lands. The injury resulting to this class of Indians from insertion of this clause in their deeds should be taken into consideration and if it outweighs the probable benefit to the body of Indians, the clause should be rejected. As pointed out above, the prevention of sales upon only a small portion of the land inhabited by these people would afford no effective moral protection, while the imposition of the condition most probably would result in a considerable financial injury to the individuals whose lands will be affected. It would seemingly work disadvantageously to them without any compensating advantage to others.

For these reasons I doubt the advisability of inserting this clause in deeds for lands formerly within the Yankton reservation, or for lands in like condition elsewhere.

Approved:

E. A. HITCHCOCK, *Secretary*.

TOWNSITES IN OSAGE INDIAN RESERVATION—SALE OF LIQUORS—ACT OF MARCH 3, 1905.

OPINION.

There is no provision in the act of March 3, 1905, relating to townsites in the Osage Indian reservation, authorizing the Secretary of the Interior to insert in deeds for lots in such townsites a clause prohibiting the sale or storage of liquor on the premises conveyed and providing for a forfeiture of title in case of violation of the prohibition.

The general laws prohibiting the introduction of intoxicating liquors into the Indian country are applicable to towns in the Osage Indian reservation.

Assistant Attorney-General Campbell to the Secretary of the Interior,
January 25, 1906. (W. C. P.)

You have referred for my opinion on the questions presented, a letter of the Commissioner of Indian Affairs of January 5, 1906. This letter embraces two matters, the first being the question of incorporating in deeds for lots in the towns of Pawhuska, Bigheart, Foraker, Fairfax and Hominy in the Osage Indian reservation, the clause recently adopted for insertion in all conveyances of Indian inherited lands, prohibiting the sale or storage of liquor on the premises conveyed and providing for forfeiture of title in case of violation of the prohibition; and the second being the modification of that clause to protect mortgagees of the land.

The Commissioner of Indian Affairs says that it has been assumed by his office that as these townsites are within the reservation the general laws prohibiting the introduction of intoxicating liquors into "the Indian country" were applicable and would suffice to prevent liquor traffic there. He further says this position was taken in 1903 with reference to the townsite of Washunga in the Kaw reservation and that so far as known no trouble has been experienced there in preventing the sale of liquor under the general law. He evidently now entertains a doubt as to the correctness of that position and regards the omission of a specific inhibition against the sale of liquor on these lots in the law authorizing the sale of the lots as a defect in that legislation and is of opinion that the defect might be more surely cured by including in all deeds covering lots in those townsites a clause similar to that now inserted in deeds of inherited Indian lands than by seeking additional legislation.

The act of March 3, 1905 (33 Stat., 1048, 1061), designates the lands to be reserved for these different towns and directs that they be surveyed, appraised, and laid off into lots, blocks, streets, and alleys by the Osage townsite commission "and sold at public auction after due advertisement to the highest bidder by said townsite commission under such rules and regulations as may be prescribed by the Secretary of the Interior." This law does not attach any condition respecting the sale of liquor on the premises nor does it authorize this Department to attach any such condition. The sale is to be absolute and unconditional. It is not the province of the executive department to remedy a supposed defect in the law in the manner proposed here, nor has it any power to do that. The insertion of a clause of the nature proposed here, which would amount to the imposition of a condition subsequent upon the title, is purely a legislative function and therefore outside the scope of the executive action. If

it be deemed necessary to have such a condition imposed Congress should be asked to grant authority therefor or to enact such additional legislation as may be needed.

It is believed, however, that the position heretofore assumed in the Indian Office is correct and that the general laws prohibiting the introduction of intoxicating liquors into the Indian country will prevent the introduction and sale of such liquors in these towns. The Osage Indian reservation is Indian country beyond question, as defined by the Supreme Court of the United States in *Bates v. Clark* (95 U. S., 204). The sale of lots within these several townsites would not destroy the character of the reservation as Indian country. The Department of Justice was asked whether there was anything in the laws of the United States in relation to the Indian territory which would prevent the establishment of a distillery on lands therein where the Indian title is extinct. In reply to that question Attorney-General Griggs, after referring to the case of *Bates v. Clark*, said (22 Ops., 232):

In the above decision in *Bates v. Clark*, all this territory remains Indian country, except as the Indian title thereto has been extinguished, and as it includes the place where the distillery in question is proposed to be erected, its erection is obviously forbidden by the section above referred to, unless the Indian title thereto has become extinct in the sense in which that expression is used in the case above cited.

Just to what extent over this vast territory thus described as Indian country the Indian title must be extinguished in order that, under the decision referred to, a particular locality therein shall cease to be Indian country is not apparent. But, in view of the evident object and purpose of Congress in this and kindred legislation to prevent the introduction of intoxicating liquors among the Indians or into localities inhabited by them, it is obvious that much more in this direction is required than that the Indian title shall be extinct as to the particular lot or parcel of land on which the distillery is erected or proposed to be erected.

In view of this and of existing facts in the Indian territory, the question submitted is somewhat indefinite. You ask in substance whether there is anything in the laws of the United States that prevents the establishment of a distillery in the Indian territory "*on lands therein* when the Indian title is extinct."

If this means merely that the Indian title to the particular lands on which the distillery is proposed to be erected is extinct, the first part of the question should be answered in the affirmative, while if it means that the Indian title is extinct there over such an extent of territory as that such territory has, under the doctrine of *Bates v. Clark* (*supra*), ceased to be Indian country, then the section above referred to does not itself prohibit such distillery.

The sale of lots in these townsites would surely not render the Indian title extinct over any such extent of territory as would cause the Osage reservation to cease to be Indian country. The laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country would still remain in force as to all the

Osage reservation and would be sufficient to prevent the sale of liquor in these towns.

The question as to the modification of the "liquor clause" in deeds of inherited Indian lands has been considered in another opinion of this date to which reference is hereby made.

Approved:

E. A. HITCHCOCK, *Secretary.*

ARID LAND—WITHDRAWAL—INCOMPLETE CLAIMS—ACT OF JUNE 17,
1902.

OPINION.

Uncompleted claims to lands withdrawn under the provisions of the act of June 17, 1902, and determined to be needed for construction of irrigation works in connection with a project that has been found practicable, should not be allowed to be perfected, but should remain in the same status as existed at the time the determination was made and the rights of the claimants adjusted upon the basis of that status.

Assistant Attorney-General Campbell to the Secretary of the Interior,
January 25, 1906. (E. F. B.)

I am in receipt of a report from the Director of the Geological Survey upon a letter from the Commissioner of the General Land Office relative to proposed instruction to be given to the register and receiver at Boise, Idaho, to "accept all final proofs offered for lands in Deer Flat reservoir site but issue no final certificates thereon pending further notice and forward said proofs to this office."

The Director is of the opinion that such instructions should not be given, and the matter is referred to me for opinion "as to which, under the law and the regulations of the Department, is the proper action to take in this matter, that recommended by the Commissioner of the General Land Office or that recommended by the Director of the Geological Survey."

I understand the lands in question have been withdrawn for use in the construction and operation of the irrigation works of the Payette-Boise project and hence have been appropriated by the government.

The different withdrawals to be made under the reclamation act were described and the proper course to be followed in such matters was pointed out with considerable detail in instructions approved June 6, 1905 (33 L. D., 607). It was there said that withdrawals under either form would not defeat any valid entry, location or selection which had the effect of segregating the lands and that all such entries, selections, and locations should be permitted to proceed

to patent or certification the same as if such withdrawals had not been made "except as to lands needed for construction purposes." The eighth paragraph of these instructions reads as follows:

In the event any lands embraced in any entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

The matter of the effect of withdrawals on existing entries was again considered in instructions of October 12, 1905 (34 L. D., 158). The course to be pursued in respect of entries within a withdrawal for construction purposes is set forth in paragraph 2 (page 163), as follows:

As soon as it shall be determined that the project is practicable and advisable and the construction of the same is approved and authorized by the Secretary of the Interior, a withdrawal will be made of all public lands shown by the examination and survey to be required for use in the construction and operation of the works, and all persons who may have made entry of such lands within such withdrawal prior to the preliminary withdrawal and who have not acquired a vested right thereto, will be notified of the appropriation of their lands for irrigation purposes and that their entries will be cancelled and their improvements paid for by the government as provided for by the 8th and 9th sections of the circular of June 6, 1905 (33 L. D., 607), unless sufficient cause be shown within sixty days from the date of such notice.

It has been determined that the Payette-Boise project is feasible and that certain lands will be needed for construction of the Deer Flat reservoir in connection with that project. The instructions referred to certainly do not contemplate that claims to lands thus determined to be needed for construction of irrigation works in connection with a project that has been found practicable, should thereafter be allowed to be perfected. On the other hand, it was the evident purpose to maintain a status existing at the time the determination was made and to adjust the rights of all claimants upon the basis of that status.

The recommendations of the Director of the Geological Survey are in accord with said instructions and should be adopted.

Approved:

E. A. HITCHCOCK, *Secretary*.

NAVIGABLE STREAMS—ISLANDS—RIPARIAN RIGHTS.

EAST KANSAS CITY LAND CO. *v.* HEIRS OF MENSING ET AL.

Upon the admission of a State into the Union it acquires in its sovereign capacity the right to all the soil under navigable rivers, subject to the power of Congress to regulate commerce among the States and with foreign nations, and all lands that may afterward form upon the beds of such streams become the property of the sovereign State, or of the proprietor of the shore lands, in virtue of his riparian right, according to the law of the State in which the land is situated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 27, 1905.* (E. F. B.)

This motion is filed by the East Kansas Land Company and the Guinotte Land Company for review of the decision of the Department of June 27, 1905 (not reported), so far as it holds that the land in controversy is public land of the United States subject to the jurisdiction and control of the land department.

The contention of the Land Company is, first, that the land now known as Mensing's Island was not in existence at the date of the admission of the State of Missouri into the Union, and having been formed since then, it inured to the State in virtue of its sovereignty; second, that even if it existed as an island at the date of the admission of the State into the Union and at the date of the township surveys, it passed by the original patents from the government conveying the surveyed lands on the opposite shores and has since belonged to the adjacent riparian proprietors.

That was the contention of the Land Company upon the appeal from the decision of your office and the argument in support of it was the same as now submitted in support of this motion.

Upon the first proposition, however, they allege additional facts bearing upon the question as to the non-existence of the island at the date of survey which were not presented when the cases were considered on the appeal from your office and which it is contended overcomes every presumption as to the existence of the island at that date that may arise from the facts upon which the decision complained of rested, it being conceded that there is no direct proof as to the actual existence of the land as an island at the date of the admission of the State.

The additional allegation of the Land Company is that in the majority of the plats of survey along the Missouri river the existence of islands adjacent to such surveys is shown, and it must therefore be presumed that where a plat of survey shows no island, none existed. Hence it is contended that the practice of noting islands along the meander line of the surveys must have prevailed at that

date as to surveys along the Missouri river and that abundant proof of a prevailing practice to that effect would have been found in the records of the General Land Office had they not been overlooked.

It is also asserted that the records of the General Land Office evidence other facts not noticed in the decision and not considered, which, it is contended, conclusively negative the existence of the island in controversy as early as 1821. The alleged facts are that in 1819 the Government entered into a contract with David Deshler for the survey of the islands in the Missouri river from the then Western boundary of the State at the mouth of the Kaw river to its confluence with the Mississippi river; that Deshler's surveys were systematic, commencing at the Kaw river he surveyed down stream numbering the islands as he found them in regular and consecutive order from 1 to 103; that some of the islands surveyed by Deshler are not shown on the original township plats and some that are shown on the township plats are not shown upon the plats of Deshler's surveys.

He did not survey any island between township 50 north, range 33 west and township 50 north, range 29 west, a reach in the river from the initial point, of 24 miles. He then found and surveyed an island which he numbered 1 and then proceeded down the river to its mouth, surveying and numbering in consecutive order. It must be presumed that at the time there were no islands existing in the river adjacent to township 50 north, ranges 33-32-31 and 30 west or they would have been surveyed and numbered by him.

The other contention is that even if it be conceded that the island existed at the date of the admission of the State into the Union the company's right as a riparian proprietor is controlled by the rulings of the highest court of the State at the time of the issuance of the patent and not by the latest adjudication of that court holding that the right of a riparian proprietor in Missouri extends only to the waters edge, citing in support thereof, the case of *Gelpcke v. City of Dubuque* (1 Wall., 175).

A re-examination of the facts has been made and a careful consideration given to the authorities cited in support of the alleged errors of law.

While the grounds of error in the findings of fact and the rulings of law as alleged in the motion do not appear to be sustained, there is a well-established rule of law governing the proprietorship of the beds and shores of rivers, that was not given consideration in the decision complained of, which, if applied to the facts as found by the Department, would determine this case adversely to the government.

That rule, as expounded by the Supreme Court in *St. Louis v. Rutz* (138 U. S., 226, 245), is "that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon."

This rule grows out of the well-established doctrine that the State upon its admission into the Union acquired in its sovereign capacity the absolute right to all the navigable waters and to the soil under them subject only to the power of Congress to regulate commerce among the States, and with foreign nations, and that all lands that afterwards formed upon such beds become the property of the sovereign state, or of the proprietor of the shore lands in virtue of his riparian right according to the law of the State in which the land is situated. (*Barney v. Keokuk*, 94 U. S., 324.)

The land in controversy was held to be public land upon the theory that a part of the island as now formed existed at the date of the admission of the State, and the United States under its right as a riparian proprietor, was entitled to the land that subsequently formed thereon as accretion.

It is evident, however, from the testimony and from the facts as found by the Department, that the greater part if not all of this accretion is now formed upon the bed of the river south of the center of the main channel, to which the State at the date of its admission acquired proprietorship under its sovereign right, so that, whatever may be the extent of the riparian right of the shore proprietor as against the State, the United States, under the rule announced in *St. Louis v. Rutz*, cannot lawfully assert any claim to that part of the island formed upon the bed of the river south of the center of the main channel as it existed at the date of the admission of the State into the Union.

There is no direct proof of the existence of the island earlier than 1837 or 1838. At that time an island known as Choteau island was on the north side of the river which some of the witnesses believed was the same as what is now known as Mensing's Island. The main channel was then south of that island, and between the north of the island and the mainland there was a slough about 300 yards wide. There is no proof as to the width of the island. The river, between the north and south banks of the mainland, was about forty chains wide.

If Choteau island had any connection whatever with Mensing's island, it is evident that after 1837, and prior to 1857, the river forced a channel through the slough on the north side of the island, cutting away a large part of it. This channel has since been the main channel of the river and the land has continued to form, filling up what was formerly the main channel of the river and attaching to the south shore.

It must be admitted that the evidence is not satisfactory as to the exact locus of what was known as Choteau island, with reference to the center of the main channel of the river in 1837 or 1838, or what part of the land in controversy, if any, lies north of the center of the

old channel. The fact, however, is well established that there was an island on the north side of the old channel opposite the site of the land in controversy as early as 1837 or 1838, which was well timbered, and the land in question was identified by some of the witnesses as that island which was formerly known as Choteau island. If that is true, it is probable, as was found in the decision complained of, that after the new channel was formed there was a part of the island known as Choteau island left on the south of the new main channel as a nucleus upon which land was formed on that part of the bed north of the center of the old channel, but that is a mere inference resting upon slight and uncertain testimony.

After the survey of the island in 1857 by the United States, the island was from time to time encroached upon by the washing of the north shore, and a considerable part of the island at this time is evidently on the bed of the river south of the old main channel. What part of the land in question is so situated can not be determined, nor can it be determined from the testimony what part of the land as surveyed by the United States army is now north of the center of the old channel. It is certain that there is very little of it, if any.

In view of the uncertainty as to the existence of the land in controversy at the date of the admission of the State into the Union, and of the fact that the present value of the land is due solely to the improvements placed upon it by the interveners, it is not believed that any public interest will be subserved by attempting to dispose of any part of said island as public lands, especially as it is not likely that any bid will be offered because of the uncertainty and doubt as to the title of the government.

The decision of June 27, 1905, is hereby vacated, and your decision holding that the land in controversy is public land is reversed.

DESERT LAND ENTRY—SUSPENSION—CONTEST—HEARING.

LANGER *v.* WASMAN.

A direction by the Secretary of the Interior to the Commissioner of the General Land Office to withhold the issuance of patent on all desert-land entries within a given land district does not amount to a suspension of such entries, and the jurisdiction of the local officers to consider contests against the same is in no wise affected thereby.

The authority of the local officers to order a hearing on a contest against a desert-land entry is in no wise affected by an order of the land department suspending all desert-land entries in the township in which the entry in question is situated, where the order of suspension was not issued until after the expiration of the statutory lifetime of the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 31, 1906.* (A. W. P.)

An appeal has been filed on behalf of Rose Wasman from your office decision of May 2, 1905, wherein you affirm the action of the local officers and hold for cancellation her desert-land entry No. 5015, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 33, T. 19 N., R. 4 E., and lots 1 and 2 of Sec. 4, T. 18 N., R. 4 E., Greatfalls, Montana, land district.

From an examination of the record it appears that claimant made said entry on August 28, 1899, and submitted the required annual proofs for the first, second, and third years; on August 22, 1900, November 11, 1901, and October 16, 1902, respectively; that prior to the last-named date—to wit, on August 5, 1902—Agnes Langer filed an affidavit of contest against the said entry, alleging, in substance, that the land involved was non-desert in character, and that the required sum had not been expended in the annual improvement thereof; that as a result of hearing regularly had the local officers, on December 5, 1902, found that the land was desert in character, and that claimant had substantially complied with the law in the matter of improvements, and hence recommended that contest be dismissed; that on December 29, 1902, contestant appealed therefrom, and during the pendency of the same before your office claimant, on July 13, 1903, gave notice of her intention to submit final proof in support of said entry on August 20, 1903. On August 13, 1903, contestant filed protest and affidavit of contest against said entry and the allowance of such final proof, again setting out the allegations contained in the former contest affidavit, and, in addition thereto, charged that the land had not been reclaimed from its desert character. No action was taken thereon pending the final disposition of the former contest, and on the date named proof was submitted by claimant, protestant not appearing, which proof was held by the local officers to await the outcome of the above-described proceedings.

The local officers, by letter of September 23, 1903, transmitted to your office the application of contestant to be permitted to dismiss her former contest and appeal then pending before your office, and to be allowed to proceed with the later contest. Your office, by decision of October 20, 1903, granted this request as to the dismissal of the contest and appeal, but, considering the case as between the government and the claimant, affirmed the finding of the local officers as to the character of the land and sufficiency of the improvements, dismissed the contest, and closed the case.

Upon receipt of notice of said decision, the local officers, on October 26, 1903, issued notice on Mrs. Langer's protest and affidavit of contest, proper service was had, and on the day set for hearing both parties appeared generally and submitted testimony of a large number of witnesses. On July 27, 1904, the local officers rendered their

finding thereon, holding that as a result of the prior contest it had been finally determined that the land was desert in character, and that the required annual expenditures had been made by the claimant, and that these questions would be considered as *res adjudicata*, leaving only for determination the question as to whether the land had been reclaimed from its desert character. On this ground they found against the claimant and recommended the cancellation of said entry.

In this connection it appears that by departmental letter of July 15, 1903, your office was addressed as follows:

You are hereby directed to withhold the issuance of patents on all entries made or that may hereafter be made, under the desert land act, in the Greatfalls district, Montana, until further ordered by this Department.

It further appears that your office by letter "P" of October 8, 1903, addressed to the local officers of the Greatfalls district, after reciting certain townships investigated by a special agent, embracing the tract covered by the entry in question, concluded as follows:

In view of the showing made by Agent Chadwick the land above described is withdrawn from entry under the desert land law and all desert entries covering any of said lands will stand suspended until investigated by a special agent to determine their *bona fides*.

You will make the necessary notes on your plats and tract books and after receipt hereof allow no entry to be made under said act, for any of the above-described lands, except in cases where the application or claim was initiated prior to receipt of this letter in your office.

From the adverse action of the local officers claimant appealed to your office, assigning errors going to the general issue, and also urging that they were without authority or jurisdiction to hear said contest because of the prior order of suspension of October 8, 1903, *supra*.

By decision of May 2, 1905, your office affirmed the finding of the local officers as to failure to reclaim the land, holding, as to their authority to hear said contest, that:

As to the question of jurisdiction, which is raised for the first time on this appeal, it will be observed: that Langer's second affidavit of contest and protest against the allowance of the final proof was filed, and the final proof itself submitted, before the order of October 8, 1903, was made, and which order of suspension remains unrevoked. But contestant having filed her contest against the entry, as before stated, charging facts which, if true, would necessarily call for its cancellation, it is competent for this office to allow the prosecution of such contest, and to approve your action in proceeding therewith, especially as by means thereof the result contemplated by the order of suspension, referred to, is attained.

From that decision claimant has appealed to this Department, and assigned errors as follows:

1. Error to maintain that the register and receiver or the Commissioner of the General Land Office had jurisdiction of the case or were authorized to

consider and act upon the contest against said entry, in view of the departmental order of Oct. 8, 1903, suspending action on desert land entries in said land district, which order of suspension remains unrevoked.

2. Error to hold the contestee had not acquired at the time her final proof was submitted a sufficient water supply, permanent in character, to reclaim the land.

3. Error to hold the cultivation was not sufficient under the decisions and rule of the land department at that time, a "marked increase in the growth of grass" being accepted as meeting the requirements of cultivation.

4. Error to hold the entry for cancellation on the record presented.

From a careful examination of the somewhat voluminous record, the substance of which is very fully and fairly stated in your office decision, and need not be here repeated, the Department finds that a clear preponderance of the testimony sustains the charge and warrants the concurrent finding and conclusion of the local office and of your office, in effect, that there had been no sufficient reclamation of the tract in question from its desert character. Did the local officers have authority to order this hearing at which such testimony was submitted?

It is now urged in support of the appeal that the departmental letter of July 15, 1903, *supra*, addressed to your office, was a general order of suspension and was in full force and effect August 18, 1903, when the present contest affidavit was filed, and therefore the local officers were without jurisdiction to act on the same. The Department, however, can not concur in this contention. The letter in question directed only that your office withhold the issuance of patents on all desert-land entries in the Greatfalls, Montana, land district, until further ordered. There was no direction that this information be conveyed to either the local officers or the entrymen. This order would not prevent the former from receiving final proofs and issuing certificates thereon, or excuse the latter from compliance with the requirements of the desert-land law.

But it is further urged that, while the affidavit of contest in the case now under consideration was filed with the local officers prior to your order of suspension of October 8, 1903, *supra*, notice had not issued thereon, and that subsequent thereto the local officers were without authority to issue such notice ordering a hearing for the purpose of submitting testimony in support of the charges against the entry and final proof.

The Department has carefully considered this phase of the present proceeding. Where the statutory life of an entry has not expired at the date of suspension, time does not run against it during such suspension, but where this period has elapsed, a subsequent suspension does not give it a new life or afford the entryman opportunity thereafter to comply with the law and submit final proof showing such compliance. It will be observed that the statutory lifetime of the

entry in question had expired prior to the issuance of your said order of suspension; and that shortly before such expiration claimant gave notice of her intention to submit final proof in support thereof showing "complete irrigation and reclamation" of the land. This was an announcement to the public generally to appear and show cause why said proof should not be accepted and final certificate issued. Contestant herein accepted this challenge by filing protest against the allowance of the final proof and affidavit of contest against the entry, alleging failure to reclaim the land from its desert character. This filing of protest, submission of final proof, and expiration of the life of the entry, having antedated the order of suspension, the right of the contestant to a hearing on such charge was not thereby delayed or defeated. It does not appear, nor does the claimant so allege, that she was in any manner injured by notice issuing and hearing being held promptly following the final determination of the prior contest, rather than to await a time when the order of suspension shall have been revoked. Claimant was served personally with a notice which informed her of the charge against her entry. At the hearing she made a general appearance, cross-examined contestant's witnesses, testified, and introduced a number of witnesses in her own behalf, without offering any objection whatever to proceeding with the hearing and determination of the contest.

For the reasons stated, and upon careful consideration of this case, the Department is of the opinion that the judgment of your office holding said desert-land entry for cancellation on the evidence thus adduced, should be affirmed, and it is accordingly so directed.

DESERT LAND ENTRY—CORPORATION—QUALIFICATIONS.

SILSBEE TOWN COMPANY.

In case of an application by a corporation to make desert-land entry, it is within the power and it is the duty of the land department to inquire into the qualifications of the individuals composing the corporation to make entry in their own right under the provisions of the desert-land law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 2, 1906.* (E. O. P.)

The Department has before it appeal filed on behalf of the Silsbee Town Company, a corporation, from your office decision of April 18, 1905, calling upon the company to show the qualifications of the individuals composing it to make entry, in their own right, under the provisions of the desert land law, in connection with the application of the company to make such entry for the SE. $\frac{1}{4}$, Sec. 8, NE. $\frac{1}{4}$, Sec. 17, T. 16 S., R. 13 E., S. B. M., Los Angeles land district, California.

The only question presented by the pending appeal is as to the authority of the Secretary of the Interior, in his administration of the public land law, to look beyond the corporation, as a legal entity, to determine its right to make desert land entry.

In the administration of the several statutes, under the provisions of which title to public land is sought to be acquired by individuals, associations or corporations, the Secretary of the Interior is charged with the duty of requiring a strict compliance with such provisions, in accord with their broad spirit and intent. The right of the Department to call for such evidence as it deems requisite, touching the qualification of applicants for entries under the public land laws, follows naturally from duty resting upon the Department to investigate fully all the facts and circumstances surrounding the proffered applications before allowing them. This right is not to be defeated nor the performance of this duty circumvented by the employment of a legal fiction.

The language of the act under which the application in question was made, touching the right of the applicant to take or hold land under its provisions, is plain:

but no person or association of persons shall hold, by assignment or *otherwise* prior to the *issuance of patent*, more than three hundred and twenty acres of such arid or desert land. (Sec. 7, act March 3, 1891, 26 Stat., 1095.)

It is contended on behalf of appellant that the holdings of an individual, represented by shares of stock in a corporation, do not represent a holding of any portion of the land entered by the corporation, in an individual capacity. That this is the general rule at law is not disputed nor is its soundness doubted. But that the courts have power and have frequently exercised it, to go behind the corporate organization and examine the acts of the individuals composing it, when to totally disregard them and look only to the legal entity before them would close the door to a full investigation of the actual facts and thereby permit the accomplishment of an end by the body corporate when such action was forbidden to the individual members, is equally well settled.

The language quoted clearly discloses the legislative intent that no person or association of persons shall obtain the benefit incident to the acquisition of title to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction. With the intent of the act clearly before us, the solution of the question here involved presents less difficulty, as a sufficient reason is at once presented for looking beyond the single qualification of the corpora-

tion as such, and examining the qualifications of the respective members who compose it.

The word "corporation" is but a collective name for the incorporators or members who compose an incorporated association; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only.

(See Morowetz on Corp., Sec. 1; also Sec. 227.)

In those cases where an observance of the rule at law that a corporation is a distinct and separate entity, may operate to conceal the real interest of the individual members, and those interests may be contrary to the policy of the law, equity will disregard the fiction.

So the idea that a corporation may be a separate entity, in a sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has *no* foundation in *reason* or *authority*, is contrary to the fact; and, to base an argument upon it, where the question is, as to whether a certain act was the act of the corporation, or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false, as to a true result.

(State *ex rel. v. Standard Oil Co.*, 49 Ohio St., 137, 178.)

In the case at bar the question involved is one solely between the government and the applicant, and the government has the same right to inquire into all the facts as would the sovereign state which brought the corporation into being, if the question were one between it and the corporation respecting an evasion or infringement of the policy of the law. In such cases the—

courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be *no* immunity for evasion of the policy of the State by its own creations.

(Ford *v. Milk Shippers' Ass'n*, 155 Ill., 166, 180.)

It is well established that where concerted action has been taken by the stockholders of a corporation in their individual capacity, tending to affect the rights, duties or obligations of the corporation itself, and inquiry into the result of such action becomes material, the courts will look to the acts of the individual shareholders as the acts of the corporation.

As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise.

(People *v. North River Sugar Refining Co.*, 121 N. Y., 582, 622.)

In the case under consideration the question involved is the same, viz: What has in fact been accomplished, though the positions are reversed and the inquiry here concerns the acts of the corporation as affecting the rights of the individual members.

In the decision last cited the court held (p. 625) that a corporation was not necessarily, and under all circumstances, entitled to exercise the same rights as an individual. The Supreme Court of the United States, speaking through Mr. Justice Brewer, has affirmed this doctrine in the following language:

A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person.

(Nor. Sec. Co. v. U. S., 193 U. S., 197, 362.)

Neither is a corporation, when the policy of the law is involved, to be considered, in all cases, as possessed of all the legal rights of a natural person, especially in those cases where by combining the rights of a person, as an individual, and his rights as a component member of a corporation, it tends to confer a double benefit contrary to the spirit of the law granting but one right:

for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations.

(People v. North River Sugar Ref. Co., *supra*, p. 625.)

With this power of the courts so firmly settled, it is difficult to see upon what grounds the contention of appellant may rest, when urged to question this authority of the Department to inquire into the real facts surrounding, and the direct effect of, the allowance of an application to enter and eventually acquire title to a portion of the public domain.

The Department is clearly of opinion, for the reasons herein stated, that the rule announced in the case of Jacob Switzer Co. (33 L. D., 383) should, in the interests of good administration, be adhered to.

In relation to the proof of incorporation offered by appellant, the Department is of opinion the same is sufficient, under the provisions of section 297, California Civil Code, and the same should be accepted. In all other respects, the decision appealed from is hereby affirmed.

**SURVEY—WITHDRAWAL—SCHOOL LAND—SETTLEMENT RIGHTS—ACT OF
AUGUST 18, 1894.**

ENSIGN v. STATE OF MONTANA.

The provision of the act of August 18, 1894, authorizing the survey, on application in behalf of the State, of any unsurveyed townships of public lands therein, and the withdrawal thereof from the date of the application until the expiration of sixty days from the filing of the township plat, with a view to satisfy the public land grants to the State, authorizes and requires the withdrawal of *all* of the lands in the townships for the survey of which application is made on behalf of the State.

The act of February 28, 1891, amending section 2275 of the Revised Statutes, protects all rights acquired by settlements made prior to survey in the field upon sections sixteen or thirty-six, reserved for school purposes, but where a township is ordered surveyed on application in behalf of the State, under the act of August 18, 1894, and the lands are withdrawn for the purposes specified therein, such settlements only as were made prior to the withdrawal are protected as against the State.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 23, 1905.* (E. J. H.)

The above entitled case is before the Department upon the appeal of the plaintiff, Edgar S. Ensign, from your office decision of November 28, 1904, sustaining the action of the local officers in rejecting his homestead application tendered upon the filing of the township plat of survey, on April 26, 1903, for the NW. $\frac{1}{4}$ of Sec. 36, T. 11 N., R. 19 W., Missoula, Montana, land district, for conflict with the rights of the State under its school land grant.

Ensign alleged settlement on the land March 14, or 15, 1902, and that he had resided thereon continuously ever since. This was prior to survey in the field, but it appears that upon application of the Governor of the State for the survey thereof, the township was withdrawn from settlement, entry, or other disposition adverse to the State, on July 17, 1899, under the provisions of the act of August 18, 1894 (28 Stat., 394), and that due notice thereof was published as required by said act.

It is claimed on behalf of Ensign that your office erred in holding that *all* of the land in said township was withdrawn from settlement, entry or other disposition adverse to the State, under the act of 1894, *supra*; that such attempted withdrawal is in conflict with section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), which amended section protects settlement rights made prior to survey in the field upon reserved school sections 16 and 36; and that Ensign was entitled to make homestead entry of the land applied for under said amended section 2275.

Said act of 1894, in substance, authorizes the governors of the several States named therein, which list includes Montana, to apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands remaining unsurveyed in said States, and for the withdrawal of said lands, "with a view to satisfy the public land grants made by the several acts admitting the said States into the Union;" and provides that upon such application being made, the Commissioner of the General Land Office shall notify the surveyor-general thereof, who shall proceed to have such survey made, "and the lands that may be found to fall within the limits of

such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey, from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants," etc.

The language of the foregoing quotation from the act of 1894, clearly authorizes and requires the withdrawal of *all* of the lands in the townships, for the survey of which application has been made, to enable the State to satisfy the several grants of public lands made by the act admitting said State into the Union, and in the case of all of said States one of the grants for which the lands were to be thus reserved "from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception," was the school land grant of sections 16 and 36 in the several townships.

Under the act of 1891, settlements made upon sections 16 and 36 prior to survey in the field are protected, but under the subsequent act of 1894, where a township has been ordered surveyed upon application of the Governor of the State, and the lands therein withdrawn for the purpose specified, such settlements only as were made prior to the withdrawal are protected as against the State. The provisions of the later act control, and as Ensign does not claim settlement prior to the withdrawal, his application must be rejected.

Your office decision is accordingly affirmed.

SECOND HOMESTEAD ENTRY—ACT OF APRIL 28, 1904.

COX *v.* WELLS (ON REVIEW).

The act of April 28, 1904, known as the "Kinkaid Act," authorizes a second or additional homestead entry of so much land, within the limits defined in the act, as added to that embraced in the first entry shall not exceed six hundred and forty acres, regardless of the fact that the entryman may have relinquished his first entry for a valuable consideration.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 7, 1906. (E. P.)

July 29, 1904, Levi P. Wells made homestead entry of the NE. $\frac{1}{4}$ of Sec. 1, T. 34 N., R. 11 W., O'Neill land district, Nebraska, against

which Peter G. Cox, on August 24, 1904, filed affidavit of contest, charging, in effect, that Wells had, on May 29, 1892, made homestead entry of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 26 and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 33, R. 8, O'Neill land district, Nebraska, which he relinquished for a consideration, and was not therefore qualified to make another homestead entry. This affidavit was rejected by the local officers on the ground that it did not state a cause of action, it being by them held, in effect, that Wells's former entry having been lost prior to the passage of the act of June 5, 1900 (31 Stat., 267), the circumstances surrounding such loss could not be inquired into. Cox appealed, and your office, by decision of December 29, 1904, sustained the action of the local officers. On further appeal by Cox, however, the Department, by decision of June 26, 1905 (38 L. D., 657), held that the said act of June 5, 1900, *supra*, was modified by the act of April 28, 1904 (33 Stat., 527), which provides, in effect, that any person thereafter applying to make a second homestead entry, he having failed to complete his former entry, must show that the former entry was not relinquished for a consideration, and that, as Wells's second entry was made after the passage of this act, the charge was sufficient. A hearing was therefore directed to be ordered on said charge.

The attention of the Department is now, by your office letter of January 29, 1906, for the first time directed to the fact that the land embraced in Wells's second entry is within the limits subject to disposition under the act of April 28, 1904 (33 Stat., 547), known as the "Kinkaid law," which, after authorizing homestead entry by one person of not more than six hundred and forty acres situated within certain defined limits, provides that "a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed six hundred and forty acres."

Considering the fact that the land in question is within the limits described in the act last mentioned and that the combined area embraced in Wells's first and second entries does not exceed the maximum quantity allowed to be entered under the act, in connection with the herein quoted provisions of the act, the Department is of opinion that it is immaterial whether Wells relinquished his first entry for a consideration or not, and hence that the charge stated does not constitute a cause of action. Therefore the order for a hearing issued in accordance with the directions contained in departmental decision of June 26, 1905, is hereby directed to be revoked.

APPLICATION—ENTRY OF RECORD—RELINQUISHMENT—CANCELLATION.

O'SHEE *v.* LA CROIX.

Where proceedings are instituted on behalf of the Government solely for the purpose of clearing the record of an existing entry, no question of a preference right is involved, and where a relinquishment is subsequently filed and there are no valid adverse rights outstanding, the rule that no application to enter shall be received until proper notation of the cancellation of the entry is made upon the records of the local office, has no application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 9, 1906. (E. O. P.)

James L. O'Shee has appealed to the Department from your office decision of November 17, 1904, denying his application to locate military bounty land warrant, No. 115,616, upon the NW. $\frac{1}{4}$, Sec. 22, T. 7 N., R. 2 W., New Orleans land district, Louisiana, because of conflict with the prior application of John L. La Croix to locate military bounty land warrant No. 19,719, upon the same tract.

The land involved was formerly embraced in the homestead entry of one James M. Arrington, against which entry proceedings had been instituted on behalf of the government looking to its cancellation. On February 24, 1904, subsequent to the hearing, but prior to final action by your office upon the testimony submitted, the relinquishment of Arrington and the application of La Croix to locate, were filed in the local office, but no notation of said relinquishment was then made upon the record. This notation was not made until May 23, 1904, following the direction contained in your office letter of May 19, 1904. On May 21, 1904, O'Shee filed his said application, which was rejected by the local officers for conflict with the prior application of La Croix. On June 3, 1904, O'Shee again made similar application, which was likewise rejected for the same reason.

In the decision appealed from, affirming this action of the local officers, the case of *Walters v. Northern Pacific Railroad Company* (23 L. D., 492), is cited, but no reference is made to the rule announced in departmental decision in the case of *Stewart v. Peterson* (28 L. D., 515), nor to the case relied upon by appellant to sustain the contentions urged in his appeal, viz., *Young v. Peck* (32 L. D., 102).

In the case of *Stewart v. Peterson*, *supra*, it was held and directed that—

In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office. Thereafter, and until the period afforded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and

held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right.

Circular of instructions, containing language equally broad, was prepared in accordance with the direction contained in this decision (29 L. D., 29).

The broad language used would appear to extend to all cases, but an examination of these cases, out of which the necessity of the rule seems to have arisen, discloses that it was not intended to apply in cases where no action on the part of your office was necessary to clear the record of an existing entry and restore the land covered thereby to the public domain.

So long as no final action had been taken by your office upon the proceedings had before the local officers, and there had been no transfer of the interest in the land, the right of the entryman to relinquish is unquestioned, and upon the filing of such relinquishment it was the duty of the local officers to make proper notation thereof upon the record. On the filing of such relinquishment, by operation of law the entry was canceled and no further action was necessary to effect that end. The making of the notation thereof was purely a ministerial act and it was clearly the duty of the local officers to promptly perform it. Had the proceedings here involved been brought by a party having a potential preference right of entry, as in the case of an ordinary contest, the benefit flowing from the filing of the relinquishment might have inured to him, and the acceptance of another application, pending the exercise of that right, would cause embarrassment; yet this would have had no bearing upon the plain ministerial duty of the local officers to note the filing thereof upon the record.

Clearly the rule announced in the case of *Stewart v. Peterson, supra*, was not intended to permit the local officers, in their discretion, to decline to make such notation. The effect of a relinquishment duly executed and filed before final cancellation of an entry is well settled, and it attaches *eo instanti* the filing thereof (*Walters v. Northern Pacific Railroad Company, supra*) and there is no discretion vested in the local officers relative to the action to be taken by them. Final certificate had been issued in the case at bar, yet it does not appear, nor is it contended, that there had been any transfer or incumbrance of the equitable title of the claimant. On the contrary, Arrington states in his affidavit of April 27, 1904—

that he has never sold, conveyed or disposed of, nor incumbered in any manner, the land embraced in his relinquished homestead entry.

While it is true the government will refuse to recognize relinquishments made after issuance of final certificate and in fraud upon *bona fide* incumbrancers or transferees (Addison W. Hastie, 8 L. D., 618;

Harlan P. Allen, 14 L. D., 224, Richard F. Hafeman, ib., 644; Paul v. Wiseman, 21 L. D., 12; Alfred A. Anscomb, 26 L. D., 337), it seems clear that no such adverse claims existed in this case nor was the action of the local officers based upon any such claim. In any event the local officers, upon the filing of such relinquishment, should have accepted applications to enter, subject to any adverse claim that might have been presented.

Where proceedings are instituted on behalf of the government solely for the purpose of clearing the record of an existing entry, no question of a preference right is involved, and where a relinquishment is subsequently filed and there are no valid adverse rights outstanding, the rule that no application to enter shall be received until proper notation of the cancellation of the entry is made upon the records of the local office, has no application.

The case under consideration is therefore not covered by departmental circular of July 14, 1899 (29 L. D., 29), and the contention of appellant, based upon departmental decision in the case of Young v. Peck, *supra*, can not be sustained.

For the reasons herein stated the decision appealed from is hereby affirmed.

MANNER OF PROCEEDING ON SPECIAL AGENTS' REPORTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

Washington, D. C., February 14, 1906.

To Special Agents and Registers and Receivers,

United States Land Offices:

The following rules are prescribed for the Government of proceedings had upon the reports of special agents of this office. All existing instructions in conflict herewith are superseded.

1. The purpose hereof is to secure speedy action upon special agents' adverse reports upon claims to the public lands, and to allow entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of the special agent's report this office will consider the same and determine therefrom whether the charges, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon

the entryman and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must state fully the charges as contained in the letter of this office, the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (a) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial of said charges with an application for a hearing, (b) or if he fails to appear at any hearing that may be ordered in the case. If the entryman or claimant applies for a hearing he may indicate therein the time and place for such hearing, subject to the approval of the local officers, the time to be not less than 60 days from date of his application therefor.

6. Notice of the charges may be personally served upon the proper party by the local officers at their office, but if this can not be done they will deliver the notice to the special agent for service under the rules. If the special agent can not secure personal service, notice may be served, upon sufficient showing by the special agent or other qualified person, by publication. The register will require such publication to be made under the rules.

7. If a hearing is asked for, the local officers will consider the same and confer with the special agent relative thereto and fix the hearing for the date and place stated in the application, if practicable under the rules, due notice of which must be given entryman or claimant. The above notice may be served by registered mail.

8. The special agent will duly submit, upon the form provided therefor, to the Receiver of Public Moneys an estimate of the probable expense required on behalf of the Government. The special agent will also serve subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The special agent must appear with his witnesses on the date and at the place fixed for said hearing, unless he has reason to believe that no appearance for the defense will be made, in which event no appearance on behalf of the Government will be required. The special agent must, therefore, keep advised as to whether the defendant intends to appear at the hearing.

10. If the entryman or claimant fails to apply for a hearing, or fails to appear at the hearing ordered, without showing good cause therefor, such failure will be taken as an admission of the truth of the charges contained in the special agent's report and will obviate any necessity for the Government's submitting evidence in support thereof.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the special agent's charges.

12. If the entryman or claimant fails to apply for a hearing or to appear at a hearing applied for, as provided in paragraph 10, or if a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof in the usual manner.

13. Appeals or briefs must be filed under the rules, but need not be served upon the special agent, nor will the special agent file any appeal or brief unless directed to do so by this office.

14. The above proceedings will be governed by the Rules of Practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees, as provided in Rules 8½ of Practice.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

SOLDIERS' ADDITIONAL HOMESTEAD—APPROXIMATION.

JOHN S. MORTON.

Only one application of the rule of approximation is allowed to each original right of soldiers' additional entry, and where the right is divided, the rule may be applied only in the location of one portion thereof; but where a portion of a right is located for a tract of land embracing merely a fraction of an acre excess, such small excess will not, under the rule *de minimis non curat lex*, be regarded as preventing the holder of the remainder of the right, in making location thereof, from applying the rule of approximation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 16, 1906. (P. E. W.)

John S. Morton has appealed to the Department from your office decision of April 24, 1905, rejecting his application, as assignee of Anna McNally, widow of William McNally, to enter, under section 2307 of the Revised Statutes of the United States, lot 7, Sec. 28, T. 33 N., R. 31 E., Greatfalls, Montana, containing 7.60 acres.

Said application is based on a military service of said William McNally and the homestead entry, No. 3281, made by him April 22, 1869, at Omaha, Nebraska, for eighty acres of land. His additional

right for eighty acres of land was duly assigned by his widow, and subsequently divided into two parts, each for forty acres, which were used as bases for the following entries:

(1) The application of Oscar Keeline, transmitted June 12, 1902, for 35.96 acres, Sundance, Wyoming, allowed March 31, 1904, final certificate No. 668, patent issued December 2, 1904.

(2) The application of Albert L. Colthrop, transmitted March 14, 1902, for 40.43 acres, Devils Lake, North Dakota, allowed April 19, 1904, final certificate No. 9093, patent issued December 31, 1904.

The applicant herein, John S. Morton is the admitted owner of the remaining right for 4.04 acres acquired from said Keeline, and the only question presented by this appeal is his right to enter 7.60 acres in accordance with the rule of approximation.

In the case of William C. Carrington (32 L. D., 203) the Department directed the preparation of a circular of instructions announcing that in all future entries under said section—

the rule of approximation will be applied only when the entire additional right originally due to the soldier, his widow, or orphan children, is offered as a basis for the entry.

This circular was issued August 7, 1903 (32 L. D., 206), and contained the following instructions additional to the foregoing:

If part of the right is located upon a tract of land agreeing in area with such right surrendered or located, then this circular will not prevent the application of the rule of approximation as to the remainder, if offered in its entirety as a basis for the entry.

If the right has been divided, and a part located and entry allowed therefor, before the date of this circular, the rule of approximation may be applied as to the outstanding and unused portion of such right, in the manner and to the extent above directed as to the additional right originally due.

In the case of Guy A. Eaton (32 L. D., 644) it was held that:

One application of the rule of approximation is allowed to each original right of soldiers' additional homestead entry; and where the right is divided, the rule may be applied only in the location of one portion thereof.

Following the views expressed in the case of Vernon B. Matthews (8 L. D., 79), and in the opinion of date June 30, 1900 (30 L. D., 105), the Department is of the opinion that the allowance of Colthrop's said application for 40.43 acres, instead of 40 acres, should be regarded as coming within the rule *de minimis non curat lex*, and not as an application of the rule of approximation, which was not considered in connection therewith.

It thus not appearing that the rule has been heretofore invoked in connection with this soldiers' additional right, and since the present application exhausts the right, it is believed that the rule of approximation may properly be applied herein, the right being for 4.04 acres, and the excess being only 3.56 acres.

If no other valid objection appear the application will be allowed, your said decision being hereby reversed.

DESERT LAND ENTRY—CORPORATION—QUALIFICATIONS OF MEMBERS.

J. H. McKNIGHT COMPANY.

It is within the power and is the duty of the land department to require a corporation, seeking to acquire title to a desert land entry as assignee of the original entryman, to show that the individual members composing the corporation are not disqualified under the desert land law to hold and acquire title to such entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 19, 1906. (J. R. W.)

The J. H. McKnight Company, a corporation, assignee of Gustavus Adolph Roensch, appealed from your decision of June 8, 1905—

to show the extent to which each individual member of said corporation has exhausted his right under the desert land law, and that the members of said corporation do not hold in the aggregate by assignment or otherwise more than 320 acres of such desert or arid land; . . . and upon failure . . . the assignment of said Roensch to said company will stand rejected.

It is argued that:

The only "terms and limitations" applying to or affecting such taking and holding, can be none other than the terms and limitations of the desert-land law itself . . . that "no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land." Sec. 7, act of March 3, 1891, 26 Stat., 1095.

It is then argued, at great length and citation of a great mass of authority, that a corporation is in law "a person" and "citizen" of the State wherein it is organized, and as such is entitled to enter such land, to the limit allowed, irrespective of the holdings of its constituent members or stockholders.

There can be no question that the object and purpose of the limitation in the act was to prevent the entry of large areas of public lands by few or by one person. This being the purpose of the provision, it is obviously the duty of the land department so to interpret and administer the law as to effectuate the purpose, and not to permit the evasion and nullification of the law by mere legal fiction.

A corporation is "a person" only by legal fiction for convenient administration of justice. It was held by Lord Mansfield in *Morris v. Pugh* (3 Burr, 1243) that:

Fictions of law hold only in respect to the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth.

A corporation is by fiction of law a citizen of the State in which it is created for purposes of the administration of justice and the removal of suits to or jurisdiction of the federal courts, but it is not a citizen within the meaning of that clause of the constitution which guarantees that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Paul v. Virginia* (8 Wall., 168); *Ducat v. Chicago* (48 Ill., 172; 10 Wall., 410); *Tatem v. Wright* (23 N. J. L., 429). The fiction of relation of a patent or other muniment of title to the date of the entry, or act of inception of the proceeding out of which it resulted, is allowed to operate only "for the security and protection" of justice, and not so as to work injustice. *Gibson v. Chouteau* (13 Wall., 92, 101); *Bear Lake Irrigation Co. v. Garland* (164 U. S., 1, 23); *Hussman v. Durham* (165 U. S., 144, 148). Legal fictions are sufficiently transparent that they are penetrated by the light of real fact when justice requires it, or they are seen to be invoked to defeat the policy of the law.

A case recently came before the Department wherein one who had exhausted his right to appropriate public lands had recourse to the device of organizing a corporation in which he held four hundred and ninety-eight shares, and two other persons held one share each. *Jacob Switzer Company* (33 L. D., 383). The Department held that the real person was not well hidden behind the fictitious one. The subject was fully considered in *Silsbee Town Company* (34 L. D., 430), and the same result was reached.

The court looked through the fiction in *McKinley v. Wheeler* (130 U. S., 630, 636), and followed its decisions in *Bank of the United States v. Devereaux* (5 Cr., 61, 87), and *Society for Propagation of the Gospel v. New Haven* (8 Wheat., 464, 491), in so doing. In *United States v. Trinidad Coal Company* (137 U. S., 160) the court held that a corporation is in legal fiction "a person," that it is in fact, and when necessary to enforce the policy and purpose of a law will be regarded as it is in fact, an aggregation and association of natural persons, and is within the inhibition of section 2347 of the Revised Statutes, inhibiting an association of persons from acquiring more coal lands than therein limited. The opinion (*ib.*, 169) holds that:

The reasons that suggested the prohibitions in respect to "associations of persons" apply equally to incorporated and unincorporated associations. But the purpose of the government would be defeated altogether, if it should be held that corporations were not "associations of persons" within the meaning of the statute, and subject to the restrictions imposed upon the latter by sections 2347 and 2350. It is unreasonable to suppose that Congress intended to limit

the right of entering coal lands to one hundred and sixty acres in the case of an individual, and to three hundred and twenty acres in the case of an unincorporated association, and leave the way open for an incorporated association to acquire public coal lands without any restriction whatever as to quantity. The language of the statute, to say nothing of the policy which underlies it, does not require or permit any such interpretation of its provisions. The words "association of persons" are often, and not inaptly, employed to describe a corporation. An incorporated company is an association of individuals acting as a single person, and by their corporate name. As this court has said, "private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name and to change its members without a dissolution of the association." *Baltimore and Potomac R. R. Co. v. Fifth Baptist Church* (108 U. S., 317, 330.)

It is useless further to pursue the discussion. There is no limit to the number of corporations that may be formed by one person, holding nearly the entire interest, associating with himself two others having only nominal interests. If, under each of such unlimited number of corporate organizations and adopted names a new right is acquired to appropriate public lands, then the policy and purpose of the law is violated, the limitation is nullified, and no limit exists as to the area of land that one individual can acquire, save the total area of the public lands and the means the individual can command. Manifestly this is urging a legal fiction, in the words of Lord Mansfield, "to an intent and purpose not within the reason and policy of the fiction." The Department will not sanction it.

Your decision is affirmed.

ARID LAND—WITHDRAWAL—ACT OF JUNE 17, 1902.

OPINION.

All entries of lands withdrawn under the provisions of the act of June 17, 1902, are subject to the conditions imposed by section 3 thereof, and a revocation of the withdrawal operates to remove those conditions and leaves the entries in the same situation as entries made prior to the withdrawal, and such conditions can not, by force of a second withdrawal, be reimposed upon such of the entries made during the period of the first withdrawal as had not been perfected at the date of the second withdrawal.

Assistant Attorney General Campbell to the Secretary of the Interior,
February 20, 1906. (E. F. B.)

By order of the Department, dated April 20, 1903, lands within the irrigable area of the contemplated Okanogan irrigation project in the State of Washington, were withdrawn from entry, except under the homestead law, under authority of section 3 of the reclamation act of June 17, 1902 (32 Stat., 388), which provides that all entries made under the homestead law, of lands within the limits

of such withdrawal and during such withdrawal, shall be subject to all the provisions, limitations, charges, terms, and conditions of the act.

While this withdrawal was in force, certain entries were allowed of lands within its limits. Subsequently (July 8, 1904) the withdrawal was revoked, but afterward (August 23, 1905) the lands were again withdrawn for use in the construction and operation of the irrigation works under what is commonly known as the first form of withdrawal.

A letter from the Director of the Geological Survey relative to such withdrawal, with a report from the Commissioner of the General Land Office thereon, has been referred to me for opinion "as to whether the entries made while the land was withdrawn under the second form, from April 20, 1903, to July 8, 1904, are now subject to limitations and restrictions of the reclamation act and should be so treated in the classification of the irrigable lands under the project."

As long as the withdrawal continued in force, the lands covered thereby were subject to entry only under the conditions imposed by the reclamation act. Those conditions attached by force of the statute to each and every entry allowed during the period of the withdrawal. The revocation of the withdrawal of its own force subjected the lands to entry and disposal under the general land laws free from all conditions except such as are imposed by those laws and with equal force removed the conditions prescribed by the reclamation act that had attached to entries made during the withdrawal.

After the revocation of the withdrawal and while the lands formerly covered thereby were subject to disposal under the general land laws, all entries of such lands whether made during the period of withdrawal or after the revocation thereof, could have been perfected free from the conditions and limitations prescribed by the third section of the reclamation act. The question now presented is whether those conditions can, by force of a second withdrawal, be re-imposed upon such of the entries made during the period of withdrawal as had not been perfected during the restoration of the lands to entry and disposal under the general land laws.

That such conditions cannot be imposed upon entries that were made after the revocation of the withdrawal, is too plain to admit of controversy. If the revocation of the withdrawal of its own force subjected the lands to disposal under the general land laws and with equal force removed the conditions that had attached to the entries made during the period of withdrawal, the logical result must be that these entries are to be treated as having been made prior to any withdrawal.

The effect of withdrawals made under the reclamation act upon entries made prior to such withdrawals is thus stated in the fifth paragraph of the instructions of June 6, 1905 (33 L. D., 607, 608) :

Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes.

In his letter of January 8, 1906, the Director says:

The township in question is located in the midst of the irrigable district, and is the center of the active operations under the project; in view of which and upon recommendation of this office, the township was again withdrawn by the Department August 23, 1905, under the first form of withdrawal.

He also states that the engineers are now at work classifying the lands and desire to have an authoritative opinion as to the status of the entries in question.

The status of the lands depends upon whether in fact they are to be appropriated for use in the construction and operation of the works. If they are, all of such lands to which a vested right had not attached at the date of the last withdrawal will be subject to appropriation for such uses. If they are not, they will not be affected by the mere technical form of withdrawal, and should be permitted to proceed to patent or certificate upon compliance with the law as directed in the instructions above referred to.

Approved:

E. A. HITCHCOCK, *Secretary*.

McKIBBEN *v.* GABLE.

Motion for review of departmental decision of October 18, 1905, 34 L. D., 178, denied by Secretary Hitchcock February 20, 1906.

COAL LAND—DECLARATORY STATEMENT—PREFERENCE RIGHT.

LEHMER *v.* CARROLL ET AL. (ON REVIEW.)

Where an association of four persons has expended not less than five thousand dollars in working and improving a mine or mines of coal on the public lands such association, in the absence of any prior or superior claim, may enter under the coal land laws not exceeding six hundred and forty acres, including such mining improvements, even though no declaratory statement may have been filed for the lands.

The object and purpose of a declaratory statement under section 2349 of the Revised Statutes are to give notice of, and to preserve for the period specified in section 2350, a preference right of entry already acquired under section 2348; and such preference right of entry is not created or initiated by the filing of a declaratory statement.

If the privilege of postponing entry in the manner provided by sections 2349 and 2350, after a preference right of entry shall have been acquired under section 2348, be not desired by the claimant, the filing of a declaratory statement before application or entry is not necessary or required; and in such case, even if the claimant should fail to make application to enter and to pay for the lands within the sixty days allowed by section 2349 for filing a declaratory statement, neither the failure in this respect nor failure to file a declaratory statement would operate to forfeit the right to purchase and enter the lands except in favor of some other qualified applicant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 20, 1906.* (A. B. P.)

This is a motion by Frank W. Lehmer for review of departmental decision of November 16, 1905, in the case of *Lehmer v. Carroll et al.* (34 L. D., 267), wherein the application by *Carroll et al.* to purchase under the coal land laws (sections 2347 to 2352, inclusive, of the Revised Statutes) certain described public lands, aggregating six hundred acres, situated in the Bozeman land district, State of Montana, was sustained and the protest by Lehmer against said application was dismissed. For convenience of reference the following extracts from said decision are here quoted:

The application itself under oath, was accompanied by the separate individual affidavits of the applicants and two other persons. In these papers it is set forth in substance that the lands applied for are of the class and character subject to sale under the coal land laws, that the applicants are severally qualified to purchase, and apply to purchase, as an association under section 2348, and that they have expended the sum of \$8,000, in developing and improving mines of coal on the lands.

With the application to purchase were presented what purport to be deeds of release and quitclaim to the associated applicants, embracing, severally, portions of the lands applied for, and for which the persons who executed the deeds had, respectively, previously filed coal declaratory statements, under section 2349. From the official records it appeared that other declaratory statements had been filed covering portions of the lands. The local officers thereupon notified the coal declarants, as well those from whom deeds of release and quitclaim had been obtained, as those who did not appear to have released their claims, that they would be allowed until December 28, 1903, to show cause, if any they could, why the associated applicants should not be permitted to purchase and enter the lands applied for. None of the parties so notified ever appeared in the proceedings.

December 26, 1903, one Frank W. Lehmer, a stranger to the record, filed his sworn protest, corroborated by the affidavit of one H. H. Griffith against the application to purchase. On this protest a hearing was had at which the protestant submitted the testimony of one witness. The applicants introduced no

evidence, but rested their case upon the proofs filed in support of their application to purchase and the cross-examination of the witness introduced by the protestant.

* * * * *

In his protest Lehmer asserts no right, or claim of right, in himself to any of the lands embraced in the application to purchase. He does not deny that the lands are chiefly valuable for coal and in other respects subject to sale under the coal land laws. His charges are, in substance and effect, (1) that no preference right of entry was acquired by any of the parties from whom the applicants obtained deeds of release and quitclaim to themselves of the lands covered by the declaratory statements filed by said parties, respectively, because none of them ever opened and improved any coal mine or mines on the lands; wherefore the declaratory statements were illegal and of no effect, and consequently no rights were conveyed by such deeds, (2) that the applicants to purchase had not themselves, either collectively or individually, prior to the time of filing their application, or at any time, opened and improved any coal mine upon any of the lands applied for other than the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. 5 S., R. 23 E., and (3) that the applicants to purchase had not, either as an association or as individuals, expended the sum of \$5,000 in working and improving any mine or mines of coal on any of the lands applied for.

It is not denied that the decision correctly represents the matters set forth in the proofs and papers submitted with the application to purchase, the proceedings had with respect to the prior coal declaratory statements, and the charges contained in Lehmer's protest.

The Department held (1) that the prior coal declarants having failed to appear as required by the notice given them were thereafter out of the case, and, the record being thus cleared of all claims to the lands other than that asserted by the associated applicants to purchase, it could make no material difference whether the coal declaratory statements were valid or not; (2) that it was not essential to the validity of the application to purchase that the associated applicants should have opened and improved a mine or mines of coal on the several tracts applied for, it appearing from the proofs that a coal mine had been opened and improved on one of said tracts; and (3) that on the question of the amount expended in working and improving such coal mine the testimony at the hearing did not weaken but tended to strengthen the showing made by the application and proofs.

The main contention in the motion for review is that inasmuch as the associated applicants to purchase had themselves filed no declaratory statement for the lands applied for, if the declaratory statements by the prior claimants from whom deeds of release and quitclaim had been obtained were invalid, a matter which upon the record was held to be immaterial, said applicants had no preference right under any declaratory statement, and for that reason could not enter more

than 320 acres of coal lands: wherefore the Department erred in sustaining the application in this case.

Section 2347 of the Revised Statutes provides that:

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to each individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

By section 2348 it is provided that:

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

It is further provided by section 2349 that all claims under the preceding section (2348) must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor, and by section 2350, that all persons claiming under section 2348 shall prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their claims, and that failure to do so shall render the lands subject to entry by any other qualified applicant.

It is argued that these sections of the statute furnish no authority for the entry, by an association of four persons, of more than three hundred and twenty acres of coal lands, notwithstanding the expenditure by or on behalf of the association of the full amount required by section 2348 in working and improving a mine or mines of coal on the lands, unless the association shall have first filed a declaratory statement under section 2349 for the lands sought to be entered, or shall have acquired rights under declaratory statements filed by others for the lands; and this, even though there be no conflicting claim to the lands at the time the application to enter and the proofs to support the same are filed. In other words, that before an association of four persons may lawfully enter six hundred acres of coal lands, the amount involved in this case, such association must

show a right of entry under one or several declaratory statements under section 2349.

No authority is cited to support the contention, and the Department knows of none; nor is there anything in the statute to warrant the construction contended for. The provisions that bear upon the question are very simple and present no matters of intricate or doubtful solution. The persistency with which the contention is urged, both in the motion for review and in the brief of counsel accompanying it, is difficult to understand except upon the theory of a misapprehension of the office or function of a coal declaratory statement.

The preference right of entry provided for in section 2348 is not, nor indeed is any right of entry, created, or initiated, by the filing of a declaratory statement under section 2349. Such preference right arises only where a person or association of persons, severally qualified to enter under section 2347, have opened and improved a mine or mines of coal upon the public lands, and are in actual possession of the same. The object and purpose of the declaratory statement are to give notice of, and to preserve for the period specified in section 2350, a preference right of entry already acquired. In other words, the office of a declaratory statement is to preserve the right, not to create it. (*McKibben v. Gable*, 34 L. D., 178.)

The declaratory statement is useful and has a purpose to serve only where time is desired within which to make payment for the lands, as to which a preference right of entry exists, and to complete the entry proceedings. In such a case the declaratory statement gives notice of the right and operates to preserve it for the period specified in section 2350. It has no other function under the statute.

Such being the only purpose of the statute in providing for the filing of a declaratory statement it must be apparent that where there is no such purpose to serve, no declaratory statement is required. What would be the reason or sense of requiring a declaratory statement in a case where its filing would be but a vain thing?

It can make no difference whether the application to enter be by an individual person for one hundred and sixty acres, or by an association of persons for three hundred and twenty acres; or that the application be for six hundred and forty acres by an association of not less than four persons who have expended \$5,000 or over in working and improving a coal mine upon the lands. The principle is the same in all cases. If the privilege of postponing entry in the manner provided by sections 2349 and 2350, after a preference right of entry shall have been acquired under section 2348, be not desired by the claimants, the filing of a declaratory statement before application or entry is not necessary and is not required. And, in such a case, even were the claimants to fail to make application to enter and to pay for the lands within the sixty days allowed by section

2349 for filing the declaratory statement, neither their failure in this respect nor their failure to file a declaratory statement would operate to forfeit their right to purchase and enter the lands except in favor of some other qualified applicant. Their preference right of entry would be gone, but the forfeiture provided by section 2350, upon failure to file a proper declaratory statement, or to pay for the lands within the required period, would operate only to render the lands subject to entry by another qualified applicant. In the absence of any other qualified applicant there would be no forfeiture because there would be no one in whose favor the forfeiture could operate; and there is nothing in the statute that would prevent the claimants, as between themselves and the government, from paying for and entering the lands, provided the law be complied with in other respects. Such is in substance the holding in the decision complained of, and the holding is clearly right. Any other construction would not only give rise to confusion but would be contrary to the spirit and plain intent of the statute.

It is further contended that there was error in refusing to order another hearing in the premises upon the recent proceedings instituted by Lehner and one B. W. Metheny, referred to and set out in the latter part of said decision. The action in this respect was clearly justified by the facts and circumstances disclosed by the record, and is adhered to.

There are other minor contentions presented by the motion for review, all relating, however, to matters heretofore fully considered by the Department. It is unnecessary to here set them out in detail. It is sufficient to say as to them that the Department is not convinced of any error in its former decision. The motion for review is accordingly denied.

UINTAH INDIAN RESERVATION—EXTENSION OF TIME WITHIN WHICH
TO ESTABLISH RESIDENCE—ACT OF JANUARY 27, 1906.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 20, 1906.

*Register and Receiver,
Vernal, Utah.*

GENTLEMEN: Your attention is invited to the act of Congress approved January 27, 1906 (Public—No. 7), which provides:

That the homestead settlers on lands which were heretofore a part of the Uinta Indian reservation, within the counties of Uinta and Wasatch, in the State of Utah, opened under the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, and March third, nine-

teen hundred and five, be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the fifteenth day of May, anno Domini nineteen hundred and six: *Provided, however*, That this act shall in no manner affect the regularity or validity of such filings, or any of them, so made by the said settlers on the lands aforesaid; and it is only intended hereby to extend the time for the establishment of such residence as herein provided, and the provisions of said acts are in no other manner to be affected or modified.

This act is given effect as to all entries made of said lands prior to November 15, 1905.

Soldiers and sailors who have filed declaratory statements under section 2309 of the Revised Statutes come within the spirit of the relief granted by the act, and where such declaratory statement has been filed before November 15, 1905, are entitled to the extension, both as to settlement and entry.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

DESERT LANDS—STATE SELECTION—ACTS OF AUGUST 18, 1894, AND
JUNE 17, 1902.

YAKIMA DEVELOPMENT CO. *v.* STATE OF WASHINGTON.

The Department declines to approve the application of the State of Washington for the segregation of certain lands in that State under the provisions of the act of August 18, 1894, known as the Carey act, and further declines to adopt the suggestion of the State to the effect that the government proceed with the reclamation of the lands, which fall within the irrigable area of a contemplated irrigation project under the provisions of the act of June 17, 1902, and, after reclamation shall have been accomplished under the proposed project, to allow the State the benefits thereof as though performed by it under the provisions of the Carey act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 23, 1906.* (G. B. G.)

By departmental decision of May 5, 1905 (not reported), your office decision herein of October 17, 1904, dismissing the protest of The Yakima Development Company against the application made by the State of Washington, on behalf of the Washington Irrigation Company, for the segregation of 55,584.99 acres of land, list No. 7, under the provisions of the act of August 18, 1894 (28 Stat., 372, 422), known as the Carey act, and acts amendatory thereof, was affirmed.

That decision was put upon the ground mainly that it was not shown that the protestant company had such rights in the premises

as called for a denial of the State's application, and your office was directed to submit the same for departmental approval.

Your office submitted the application in accordance with this direction, but there having in the meantime arisen certain problems affecting the reclamation of the lower Yakima basin, in connection with the administration of the act of June 17, 1902 (32 Stat., 388), known as the reclamation act, it devolves upon the Department to consider whether the Secretary of the Interior would be justified in entering into a contract with the State for the reclamation of the lands here involved under the act of August 18, 1894, *supra*.

In this case the State proposes to reclaim 55,584.99 acres of land. It is asserted by the State and not disputed that the Washington Irrigation Company has a water location or locations on the Yakima River sufficient to reclaim this land, but the data collected by the reclamation service raise grave doubts as to whether there is sufficient water in the stream in the latter part of the summer and early fall to satisfy its claimed appropriations. It is further suggested that said company will not be permitted to appropriate this water to a beneficial use, except after litigation with many other appropriators and irrigators, and in any event, if it succeed in this litigation, the result will be to remit large bodies of lands now irrigated from the waters of this river to their desert condition to the irreparable injury of a large number of people. Besides, it appears that a large portion of the lands covered by the State's scheme are of the alternate even-numbered sections within the limits of the grant to the Northern Pacific Railroad Company, and the Department questions whether it will not be a misuse of the waters of this stream to attempt to irrigate a checker-board area. If it be suggested that the State may contract for the irrigation of its lands, the answer is that there is not sufficient water in the river as now conserved, or as may be conserved under the State's scheme, to accomplish this end. Besides, the railroad company, through its land commissioner, has expressed to this Department the opinion that the best interests of all concerned demand that the United States reclamation service be given full opportunity to investigate and determine the best method of further developing the irrigation possibilities of the valley named, and that in the meantime the existing status of all lands, whether public or private, falling within the government's project should be maintained, thus showing that the company had no intention at this time of entering into a contract other than such as might be entered into with the United States for the reclamation of its lands. Moreover, it is not shown that the State has an enforceable contract with the irrigation company for the utilization of such water supply

as the company may in law and fact own. So far as appears from this record, or so far as the Department has been able to ascertain, the company has merely agreed to enter into a contract with the State to reclaim these lands, and the agreement provides for a nominal forfeit of \$250 in case the company "fails to so contract." It thus appears that the damages which might grow out of the failure of the company to execute the contract in question have been definitely ascertained by agreement of the parties, and it seems clear that upon such failure the company's liability could be satisfied by the payment of the sum named, and it appearing that said company has agreed to sell its properties, including the water rights in question, to the United States, the conclusion seems justified that said company considers its agreement with the State at an end, and that it does not intend to enter into a formal contract for the reclamation of these lands.

Upon the other hand, the United States reclamation service purposes, if it be given full opportunity in this valley, to reclaim, by impounding the flood waters in certain natural basins, a much larger area than is possible by the State under its proposed scheme. The government's engineers report that this project is feasible, that sufficient funds are available for its accomplishment, and the reclamation service assures the Department that it will be undertaken at an early date, unless the proposed contract be made with the State, in which event it is said with considerable reason that the government's project must be abandoned.

The preliminary surveys for the government's project have been executed and a withdrawal of the lands necessary in the maintenance of the proposed storage reservoirs was made more than a year ago.

But it is now contended on behalf of the State, though it was not so urged or said in the earlier presentation of this matter, that the State's scheme for the reclamation of these lands under the Carey act, and the government's Yakima Valley project, which includes them, may stand together; that a segregation thereof may be made under the Carey act, and the contract therein authorized between the State and the Secretary of the Interior executed, and that the reclamation service may still proceed to reclaim the lands for the State, and thus give the State the benefit of certain charges which may be assessed against them under the Carey act, to be used by the State in the reclamation of other lands.

This contention has been most carefully considered, not only because it is novel, but because it was earnestly hoped that the Department might see a way to allow it. But it is not believed that this can be done. Not only are grave doubts entertained as to the legality of such procedure, but it is not thought as a matter of administrative

policy that this Department would be justified in approving this very complicated, questionable, and perhaps impracticable scheme, which in the end would necessarily result in the patenting to the State of a large body of lands which will not have been reclaimed by the State, but which in fact will have been reclaimed by the United States. The difficulties presented upon the whole case are believed to be insuperable, and therefore fatal to the State's contention.

The Secretary of the Interior is charged by section 441 of the Revised Statutes with the supervision of the public business relating to the public lands. This means, as said by the Supreme Court of the United States in the case of *Knight v. Land Association* (142 U. S., 161, 177), that in the administration of the trusts devolving upon the government, by reason of the laws of Congress, that officer "is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States."

Under all the circumstances of this case, looking to what is conceived to be the best interests of the whole people, and in the exercise of the discretion thus vested in the Secretary of the Interior, I must decline to enter into the proposed contract with the State, and the State's list is herewith returned without my approval.

DESERT LAND ENTRY—SUSPENSION—CONTEST.

WHITMAN *v.* HUME.

A contest against a desert-land entry, based solely upon the ground that the land is non-desert in character, may properly be entertained during suspension of the entry; but a contest charging that the entryman has failed to comply with the requirements of the law should not be entertained during such period where the suspension becomes effective prior to the expiration of the statutory life of the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 23, 1906. (E. O. P.)

Dalton Whitman has appealed to the Department from your office decision of November 10, 1905, dismissing his contest against the desert land entry of Sadie A. Hume for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 23, T. 19 N., R. 3 E., Greatfalls land district, Montana.

The entry in question was made March 2, 1901, and by direction of your office suspended October 8, 1903, which suspension remains unrevoked. Contest affidavit was filed February 7, 1905, and notice issued, service of which was made, as shown by the return, February 14, 1905. At the final hearing, April 6, 1905, claimant asked that the contest be dismissed for want of jurisdiction on the part of the local

officers to entertain a contest initiated during the term of suspension. The motion was overruled and testimony was submitted on behalf of the parties.

As a basis of the contest it is charged in the affidavit filed that claimant—

has not complied with the desert land law; there is no water on the land, no ditches built, no system of irrigation to reclaim the same; that said land is not desert in character but will raise good crops without irrigation; that claimant has not expended the sum of \$1.00 per acre each year for three years.

Your office found that the action of the local officers in denying the motion to dismiss the contest was correct, and considered all the testimony introduced touching the contest charges.

The manifest object of the suspension of the entry in question was to ascertain the character of the land in order to determine whether it was properly subject to entry under the desert-land law. This question is one going directly to the validity of the entry in its inception, and one which, in the interest of both the government and the claimant, should be determined with as little delay as possible. Especially does the interest of a claimant demand an early determination of this question that his rights may be definitely fixed and his subsequent expenditure of labor and money in the required improvement of the land protected. Improvements made upon land afterwards declared to be non-desert in character, though ample under the requirements of the desert land law, would not render an entry made under that law valid, for if such entry was invalid because of the non-desert character of the land, no act of the claimant performed in an attempted compliance with the law would prevent cancellation, as an entry of land not desert in character is unauthorized by the desert-land law and is not merely voidable but absolutely void. Therefore justice demands the speedy ascertainment of the character of the land, and the rights of a claimant are not prejudiced by permitting, at any time, the initiation of a contest for that purpose, as his rights remain the same whether the object of the suspension be accomplished either by contest or hearing ordered on behalf of the government. It is clear, therefore, as announced in departmental decision in the case of *Porter v. Carlile*, dated January 9, 1906 (34 L. D., 361), that contest based solely upon the ground that the land is non-desert in character may properly be entertained during the suspension of the entry.

As time does not run against an entry during its suspension, the rule cannot be intended to permit contests against entries suspended prior to the expiration of the statutory life thereof, based upon allegations of non-compliance with the law. (See departmental decision of January 31, 1906, in the case of *Langer v. Wasman*, 34 L. D., 426.)

It is clear, therefore, your office and the local office erred in considering any testimony offered in support of the allegations charging failure on the part of claimant to comply with the provisions of the desert-land law, but properly passed upon the testimony touching the character of the land. In the case of *Porter v. Carlile, supra*, two grounds of contest were joined in the affidavit and the Department, without specifically finding that one of the grounds alleged was sufficient basis for contest, denied the jurisdiction of the local officers. However, in that case the local officers found that the land was desert in character and the only valid ground of contest was thus refuted, and the jurisdiction of the local officers denied upon the other ground alleged.

In cases where other counts are joined with an allegation of non-desert character of the land, as a basis for contest against suspended entries, the local officers in order to prevent the introduction of irrelevant testimony, might properly require contestants to strike from the affidavits all allegations not going to the character of the lands.

In the case at bar the testimony tends to support the concurrent findings of your office and the local office that the land covered by the entry is desert in character, and as no other question is in issue, the contest should be dismissed. The character of the land having been determined favorably to the claimant, the suspension as to the land embraced in her entry should be revoked and she permitted to proceed with the perfection of her entry.

For the reasons herein stated, the action of your office dismissing the contest of Whitman is hereby affirmed.

A certified copy of final proof submitted by claimant since the hearing accompanies the record transmitted, but as this is no part of the contest proceedings and not properly before the Department at this time, no consideration will be given thereto.

FOREST RESERVE—LIEU SELECTION—ACTS OF MARCH 3, 1905, AND
JUNE 4, 1897.

W. E. MOSES LAND SCRIP AND REALTY COMPANY.

Where at the date of the act of March 3, 1905, repealing the exchange provisions of the act of June 4, 1897, no selection had been made in lieu of lands within a forest reserve relinquished to the United States in accordance with the provisions of the act of 1897, the land department is without authority to now permit such selection to be made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 24, 1906. (J. R. W.)

The W. E. Moses Land Scrip and Realty Company, hereinafter styled the selector, appealed from your decision of April 18, 1905,

rejecting its application (your office docket A., 615), under the act of June 4, 1897 (30 Stat., 36), to select the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 29, T. 25 N., R. 36 E., N. M. M., Clayton, New Mexico, in lieu of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 32, T. 10 N., R. 13 E., N. M. M., in the Lincoln forest reserve, Lincoln county, New Mexico, relinquished to the United States.

March 30, 1905, the selector filed its application, which, for purposes of this decision, is assumed, but not decided, to be in strict compliance with existing rules and regulations respecting the forms of proof of the character and condition of the land selected required in such proceedings. Therewith was filed a duly authenticated abstract of the selector's title to the base tract, showing that patent of the United States was issued January 18, 1896, for the base tract and other lands to John H. Phillips, who, with his wife, conveyed that title, December 17, 1904, to the selector, which, January 12, 1905, filed in the proper record office its deed, in due form, relinquishing the title to the United States, in consideration of the act of June 4, 1897, *supra*, and the right thereunder "to select in lieu thereof a tract of vacant land open to settlement." The abstract of title shows that the land was at the time free of all other claim of title, tax, or other incumbrance, and the recorded deed of relinquishment was filed with the abstract of title and application for selection. You rejected the application solely because the act of June 4, 1897, was repealed by the act of March 3, 1905 (33 Stat., 1264), which enacted:

That the acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected *bona fide* claim or patent within a forest reserve, but the validity of the contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired: *Provided*, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

The rejection of the selection is claimed to be erroneous, and the effect of the act of March 3, 1905, is the sole question here considered. Counsel in argument say:

Where a base tract was reconveyed to the United States prior to March 3, 1905, the first and most essential requirement of the exchange act of June 4, 1897, has been fulfilled, in consequence of which the Government must have entered into an implied contract then and there to complete the transaction whenever thereafter a proper lieu tract is designated and applied for; and this partial performance prior to the repeal binds the United States . . . to complete the exchange and give value received for the reconveyance; the refusal to complete the exchange would be tantamount to the repudiation by the United States of its own solemn agreement. . . . The partial performance

and the surrender of the consideration by the selector prior to the repeal does not bar his right to receive from the United States the equivalent guaranteed by the act of June 4, 1897; in other words, that partial performance by the moving party in the transaction entitles him to the completion of the terms of the contract by the United States. . . . The forest lien laws are repealed "so far as they provide for the relinquishment, selection and patenting of lands in lieu of tracts," &c. The relinquishment and patenting are taken in conjunction. Palpably no lands may be relinquished after the date of the act. But where a relinquishment had previously been made, it may be inferred that Congress intended, notwithstanding the absence of express unambiguous terms, to except such initiated claims against the United States from the operation of the statute of repeal.

The act of March 3, 1905, repeals not merely the invitation to private owners to relinquish their lands, but all the other provisions looking to an exchange. An exchange is essentially a single contract. The rights in the things exchanged mutually vest at the same point of time. *Lessieur v. Price* (12 How., 59, 74). While the regulations under the act of June 4, 1897, require the private owner of such lands to record his deed and to prepare and file an abstract and deed at the time he makes his selection, it can not be held that good equitable right to the land relinquished passes to the United States by record of the deed, for some officer of the United States must examine the title, pass upon its sufficiency, and accept it. *Cosmos Company v. Gray Eagle Company* (190 U. S., 301, 312). It is a general principle in the law of real estate that title does not pass until the deed is delivered to the grantee. Though acceptance of a title conveyed is, under some circumstances, presumed from its being beneficial to the grantee, it will be seen from examination of such cases that there was a lapse of time with an entry into possession by the grantee, or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. No case is cited, and none has been found by the Department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received the conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into.

The act of June 4, 1897, was a mere proposal for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the land department. Until it is so filed the United States can know nothing of it, and no officer authorized to act on part of the United States can determine whether such proposed exchange can be approved or not. There is not only no con-

tract, but no existent facts from which a contract of exchange can arise. It all rests solely in the one mind of the private owner as something he merely contemplates doing, and there can be for that reason no concurrence of two minds, which is essential to the relation of contract. Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated, and is merely a purpose in the private owner's intent.

A proposal may be withdrawn at any time before acceptance. That the act of March 3, 1905, was a withdrawal of the proposal of exchange hardly admits of question. Were it not so intended, the proviso was wholly unnecessary. If it was intended that selections might be made to satisfy all relinquishments of land made with intent in future to make selections, then it was unnecessary to permit the perfecting of incomplete selections actually made, or to permit reselections upon bases assigned in previous ones that failed without the selector's fault. The proviso necessarily implies that Congress intended to withdraw its general proposal of exchange, and to limit future selections to the specified excepted cases. Congress has plenary power over the subject of disposals of public lands, and the land department is without authority to dispose of public lands unless granted to it by Congress. If it assumed to do so, patents to lands issued without authority of law would be mere nullities, conveying no title. As held in *Burfenning v. Chicago, St. Paul, &c. Railway Company* (163 U. S., 321, 323):

The action of the land department can not override the express will of Congress, or convey away public lands in disregard or defiance thereof. *Smelting Co. v. Kemp*, 104 U. S., 636, 646; *Wright v. Roseberry*, 121 U. S., 488, 519; *Doolan v. Carr*, 125 U. S., 618, 625; *Davis's Adm'r v. Weibbold*, 139 U. S., 507, 529; *Knight v. U. S. Land Association*, 142 U. S., 161, 176; *Morton v. Nebraska*, 21 Wall., 660, 674.

The argument, based upon the supposed hardship and injustice of withdrawing the proposal as to lands relinquished before date of the repealing act, is one proper to be addressed to Congress, not to the land department, which has no longer any power to allow an exchange, nor yet power to reconvey the title to the relinquished land, if that vested by record of the deed of relinquishment. Congress has the matter under consideration in various bills, now pending before it. This refutes the charge of injustice. No doubt Congress will afford a remedy proper to the case.

Your decision is affirmed.

MINING CLAIM—STATUTE OF LIMITATIONS—SECTION 2332, R. S.

CAPITAL No. 5 PLACER MINING CLAIM.

An applicant for patent to a mining claim who, invoking the provisions of section 2332 of the Revised Statutes, proves that he, or his grantors, has held and worked the claim for the period of time prescribed by the local statutes of limitation for mining claims, is not required to produce record evidence of his location, or to give any reason for not producing such evidence.

Section 2332 simply declares what proof shall be sufficient to show possessory title in an applicant for patent, in the absence of any adverse claim, and does not dispense with the requirement of section 2325 of an expenditure of five hundred dollars in labor or improvements upon the claim, as a prerequisite to the issuance of a patent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 27, 1906.* (A. B. P.)

January 5, 1904, the Capital Mining Company made entry for the Capital No. 5 placer mining claim, embracing the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 5, T. 15, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 32, T. 16, all in range 16 west, Harrison land district, Arkansas. From the proofs upon which the entry was allowed it appears that the company, invoking the provisions of section 2332 of the Revised Statutes, submitted evidence showing that it had held and worked the claim for the period of three years—the time prescribed by the statute of limitations for mining claims in the State of Arkansas—and had expended the sum of \$100 each year in working the claim.

By decision of November 11, 1904, your office held that the entry was not warranted by the provisions of section 2332 of the Revised Statutes, for the stated reasons, in substance, (1) that said section applies only where the record of the mining location is imperfect, or has been lost, or where for some other reason possessory title cannot be shown by record evidence, none of which conditions is made to appear in this case; and (2) that said section does not do away with the requirement of section 2325 of the expenditure by an applicant for mineral patent of \$500 in labor or improvements upon the claim, which requirement has not been here met. The claimant company was allowed sixty days from notice within which to show cause why the entry should not be canceled, in default of which and of appeal, it was stated the entry would be canceled without further notice. The company has appealed.

The provisions of section 2332, here involved, are as follows:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim.

1. There is nothing in this section to warrant the construction by your office as to proof of possessory title in cases where applicants for patent, or their grantors, have held and worked their claims for the period of time prescribed by local statutes of limitation for mining claims. All that is required in such a case to establish the possessory title, in the absence of any adverse claim, is evidence satisfactorily showing that the claim was so held and worked for the time prescribed; and it can make no difference whether record evidence of the location is in existence and might be furnished or not. An applicant for patent who has made such showing is not required to produce record evidence of his location, or to give any reason for not producing such evidence. On this question the decision of your office cannot be sustained. (Little Emily Mining and Milling Company, 34 L. D., 182.)

2. But on the question of the amount of expenditure in labor or improvements upon the claim, your office decision is clearly right. Section 2332 simply declares the kind of proof that shall be sufficient, where the stated conditions exist, to establish the possessory right in an applicant for patent, in the absence of any adverse claim. The section in no manner relates to or involves any other matter of proof in patent proceedings, and does not dispense with the requirement of section 2325 of an expenditure of \$500 in labor or improvements upon the claim as a prerequisite to the issuance of a patent. (Barklage v. Russell, 29 L. D., 401; Lindley on Mines, p. 1274.)

The proofs in this case show the expenditure of only \$300 upon the claim, and for this reason the entry was improperly allowed, and cannot be sustained. On this question the decision of your office is affirmed. In other respects said decision is modified to conform to the views herein expressed.

AFFIDAVIT OF CONTEST—CHARGE.

MCMULLEN v. PURKEYPILE.

An affidavit of contest against a homestead entry, charging, in effect, that the entrywoman had, since making entry, married and gone to reside with her husband upon his uncompleted homestead entry, but containing no charge that she had abandoned her claim for more than six months prior to the initiation of the contest, does not state facts sufficient to warrant cancellation of the entry, and should not be entertained.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 27, 1906. (J. L. McC.)

Belle Purkeypile, on December 29, 1900, made homestead entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 28, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 28 N., R. 16 W., Alva land district, Oklahoma.

On October 5, 1903, Burr McMullen filed affidavit of contest against said entry, and on the next day filed an amended affidavit, the latter of which alleged:

Said defendant, since making said entry was married to one Charles M. Cline, and is now living with him as his wife on the homestead entry of said Cline, being homestead entry 11,374, made April 9, 1900, for lot 4 and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 1, and lot 1 and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 2, T. 27, R. 16, Woods County, O. T., both of said entries being less than five years old, and both being intact at the date of filing the original affidavit of contest herein, and are now intact.

At the hearing had in the case the defendant appeared by her attorney, who demurred to said amended contest affidavit, on the ground that it did not state facts sufficient to warrant the cancellation of the entry. This demurrer was overruled, and testimony taken, as the result of which the local officers found that the allegations of the contest affidavit had been sustained, and they recommended the cancellation of the contested entry. The defendant offered no evidence, but stood on her demurrer, and appealed.

Your office, by decision of May 8, 1905, sustained the action of the local officers. Counsel for the defendant has filed an appeal to the Department.

The appeal contends, in substance, that your office erred in not holding that the local officers should have sustained the demurrer; in not finding that the contest was filed prematurely; in not holding that the local officers erred in admitting testimony as to facts occurring subsequently to the filing of the contest affidavit (to wit, that the husband and wife, *after* the filing of the affidavit and up to the hearing, continued to live together on his land); and in not finding that they should be given the right to elect which of the two entries they would hold. In his argument in support of the appeal counsel says:

We contend for nothing in this argument except that the contest was premature, and that the defendant and her husband have the right to elect which of the two entries they would hold.

The basis of this contest was not the marriage of the woman, for that is not cause for contest. But the basis was abandonment, following the marriage. Section 2297 of the Revised Statutes authorizes contests for abandonment only where the entryman has "abandoned the land for more than six months." In this case it was neither alleged nor proven that the abandonment existed for "more than six months," the proof showing the contrary.

The rulings of the Department on this point have been uniform and numerous. In the case of *Hay v. Yager et al.* (10 L. D., 105), a contest affidavit was filed, alleging:

That Yager had wholly abandoned said tract before the filing of the original affidavit, by removing to the State of Indiana with the intention of permanently

remaining there; that he had been residing in the State of Indiana since four months prior to the filing of the original affidavit:

the contention in that case being that such removal to the State of Indiana, "with the intention of permanently remaining there," raised a legal presumption that he had abandoned his claim in California—as in the case here under consideration it is contended that Mrs. Cline's going to her husband's residence immediately upon her marriage raised a legal presumption that she had abandoned her claim. But in the Hay-Yager case the Department ruled:

Said affidavit was not sufficient. In order to sustain a contest against a homestead entry for abandonment it must be shown that such abandonment had continued for a period of six months; and as a consequence it must be so alleged in the complaint.

To the same effect see *Baxter v. Cross* (2 L. D., 69); *Bennett v. Baxley* (ib., 151); *Hemsworth v. Holland* (8 L. D., 400); *Miller v. Worner* (27 L. D., 247); and many others.

In the case here under consideration, the contest affidavit did not allege abandonment for six months, and the demurrer thereto should have been sustained. When, upon the taking of the testimony, it was found that it failed to show abandonment for six months prior to the initiation of contest, said contest should have been dismissed. The action of your office in holding the defendant's entry for cancellation under the circumstances set forth was erroneous, and is hereby reversed.

DESERT LAND ENTRY—IMPROVEMENTS.

INSTRUCTIONS.

The act of March 3, 1891, contemplates that the expenditures made upon a desert land entry in compliance with the requirements of section 5 thereof shall be for permanent improvements necessary to the irrigation, reclamation and cultivation of the land, and as residence upon a desert land entry is not required, the erection of a dwelling-house thereon is not a permanent improvement in contemplation of the act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 27, 1906. (A. W. P.)

The Department is in receipt of your office letter of February 5, 1906, directing attention to the case of John W. Bill (20 L. D., 61), wherein it is held (syllabus) that—

The cost of fencing may be properly shown as an expenditure authorized under section 5 of the desert land act of March 3, 1891;

to the case of Frederick H. Weltner (Ibid., 81), holding (syllabus) that—

The proof of annual expenditure in permanent improvements upon the land, required under the desert land act of March 3, 1891, may properly embrace money expended for fencing the tract involved;

and the case of *Holcomb v. Scott* (33 L. D.; 287), wherein are enumerated, as among the improvements on claimant's desert-land entry, a "substantial two-story house" and "a stable sufficient to house eight or ten head of stock," and in conclusion gives expression to the opinion that the improvements placed on the land "were far above the average."

The above reference was made preliminary to calling attention to the departmental decision in the case of *Holcomb v. Williams* (33 L. D., 547), holding, *inter alia*, that the expenditure made in the erection of a dwelling-house on such an entry can not properly be considered as compliance with the requirement of the desert-land law in the matter of permanent improvements.

Finding it difficult, as you state, to harmonize this holding in the case of *Holcomb v. Williams*, *supra*, with the said former departmental rulings and the practice of your office from and after the passage of the act of March 3, 1891 (26 Stat., 1095), in effect determining that, if fencing may be considered a permanent improvement, as therein contemplated, the same status could not be denied as to a dwelling-house, you ask to be advised as to the scope intended to be given this latter decision, and whether it was intended to overrule former holdings, and limit the allowance for expenditures on desert-land entries to the necessary acts performed in the furtherance of the scheme of contemplated irrigation of the lands so entered.

The act of March 3, 1891, *supra*, added five sections—numbered from four to eight, inclusive—to the original desert-land act of March 3, 1877 (19 Stat., 377). Section 5 of said amendatory act provides as follows:

That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the

~~twenty-five cents advanced~~ payment shall be forfeited to the United States, and the entry shall be canceled. ~~Nothing herein~~ contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

It is to be observed that the object of this law is to provide a method for reclaiming unappropriated, non-segregated public land, arid or desert in character. The above section in part provides that, in order to secure patent therefor, at least three dollars per acre must be expended in the purchase of water rights, necessary irrigation by means of canals and ditches, in permanent improvements thereon, and in the required cultivation of such an entry; and that within three years the entryman must submit annual proofs showing that the full sum of one dollar per acre has been expended in such *necessary improvements* during each of said years.

Thus it appears that this expenditure must be for purposes necessary to the irrigation, reclamation and required cultivation of the land. To this end, water-rights must be secured, and canals, branch and lateral ditches constructed sufficient to distribute the water to the several minor legal subdivisions. In order to protect this work of construction and subsequent cultivation, as has been uniformly held by this Department, fencing is a permanent, and presumably a necessary, improvement. The same may also be said of a barn and well, sufficient to house and care for stock needed in the accomplishment of such an undertaking.

Residence on such an entry, however, is not required by the desert-land law, and it would not seem, therefore, nor has the Department ever so held, that the erection of a dwelling-house thereon would be considered as a necessary permanent improvement in contemplation of this act. In the case of *Holcomb v. Scott, supra*, the only material question presented for consideration was as to whether such an entryman, who became the owner of improvements placed upon the land by a prior entryman in compliance with the requirements of the desert-land law, was entitled to credit for such improvement the same as if placed thereon by himself. The character or sufficiency of the improvements was in no way questioned. It is true that the house was enumerated with other improvements, consisting of a twenty-eight foot well, curbed up and supplied with a windlass; a stable sufficient to house eight to ten head of stock; tract fenced on one side, with posts supplied in part for the other sides; that about twenty acres of the land had been thoroughly cleared of sage brush and about fifteen acres leveled; that water had been secured from a company operating and maintaining a large canal, and ten acres irrigated and cultivated to crop one season. In view of the fact that the entry was

but for forty acres, it was found that these necessary improvements were far above the average, and that good faith was manifest.

In the case of *Holcomb v. Williams*, *supra*, proof was offered, and by your office approved, setting forth that claimant had, during the first, second, and third years, made the improvements required by the desert-land law, specifying in each case a house only, which he had built on the land during the time he had held the same under the homestead law. As a result of evidence adduced at the hearing held on Holcomb's contest, however, it was disclosed that other and necessary improvements had been made on the tract sufficient to meet the requirement as to annual expenditures, aside from the dwelling-house, which, it was directly held, could not in this respect properly be considered as compliance with the desert-land act.

While it is not disclosed from an examination of the reported decisions that this question had ever been before the Department for consideration prior thereto, yet, in so holding, it was not intended, nor does it appear, as herein indicated, to in any way modify the former decisions allowing the enumeration of the cost of fencing, as well as any other necessary permanent improvements, in the proof of annual expenditures required by the said act contemplating the irrigation and reclamation of vacant public arid or desert lands, and which improvements are in promotion of the purposes of the law.

HOMESTEAD ENTRY—ADDITIONAL—KINKAID ACT.

JAMES W. LUTON.

The act of April 28, 1904, commonly known as the Kinkaid act, contemplates only one additional entry under its provisions; and where such entry is made, even though for an amount of land less than authorized by the act, the right is thereby exhausted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 28, 1906.* (J. L. McC.)

James W. Luton, on September 8, 1902, made homestead entry for the NE. $\frac{1}{4}$ of Sec. 6, T. 34 N., R. 23 W., Valentine land district, Nebraska.

On July 26, 1904, he made additional entry under the act of April 28, 1904 (33 Stat., 547—commonly known as the "Kinkaid act"), for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 6.

On December 2, 1904, he applied to be allowed to "amend" his additional entry, so as to include also the NW. $\frac{1}{4}$ of Sec. 5, T. 24 N., R. 23 W., same land district.

This last application was rejected by your office letter of July 18, 1905. From this action the applicant has appealed to the Department.

The use of the word "amend," taken by itself, would indicate that the applicant wished to substitute the land last-described in place of that first applied for under the Kinkaid act. But an examination of the record shows that he desires to enter it in addition to that entered by him September 8, 1902, and July 26, 1904. The appeal states:

At the time the entryman made his additional filing he was informed that he could make a filing for the land that was then subject to entry, and later amend his application to include other land that might become subject to entry, if it lay adjoining his entry; that at the time he made said additional filing he had bargained for a relinquishment covering the NW. $\frac{1}{4}$ of Sec. 5, T. 34, R. 23, but the relinquishment had not been executed, and affiant was unable to secure the relinquishment at that time; that at the time of making said additional entry he had no thought of exhausting his homestead right, but fully intended to secure the relinquishment and make application to amend his filing, as he has since done.

The act referred to provides, among other things—

That from and after sixty days after the approval of this act, entries made under the homestead laws in the State of Nebraska, west and north of the following line shall not exceed in area six hundred and forty acres.

Lands within the limits named are to be entered "under the homestead laws." This language clearly implies that, except as the act itself shall distinctly provide, the provisions of the homestead laws then in existence shall apply. Among these is one to the effect that by making one entry thereunder the right is exhausted. The second section of the act provides that its provisions shall be applicable to persons owning and occupying land "heretofore"—that is, prior to April 28, 1904—entered by them. The third section contains a proviso to the effect that any former homestead entryman who shall be entitled to "an" additional entry shall have, etc.

If the contention of this applicant were correct, a person who had already entered one hundred and sixty acres of land would be authorized to make twelve other entries, of forty acres each, at irregular intervals, as he might secure relinquishments. The undoubted intention of Congress was to permit a person who had already made entry of one hundred and sixty acres (or less) to make "an" additional entry—not a series of entries—of land sufficient to aggregate six hundred and forty acres.

The Department is of opinion that by making one entry under said act of April 28, 1904, the entryman exhausted his right under said act. Your office decision in rejecting his second application under said act was therefore correct, and is hereby affirmed.

MINING CLAIM—BLANKET LODGE—END LINES.

JACK POT LODGE MINING CLAIM.

In case of a mining location upon a blanket lode or vein, the lode line may not be extended in zigzag form so as to make the distance between the side lines of the claim exceed the width of six hundred feet allowed by law in the location of vein or lode claims.

The mining laws contemplate that the end lines of a lode claim shall have substantial existence in fact, and in length shall reasonably comport with the width of the claim as located.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 28, 1906.* (A. B. P.)

December 28, 1903, E. M. Thompson made entry for the Jack Pot Lode Mining Claim, survey No. 1779, Huron land district, South Dakota. By decision of January 13, 1905, your office required an amended survey of the claim, and directed that the entryman be allowed sixty days from notice within which to apply for such survey or to appeal; in default whereof it was stated the entry would be canceled without further notice. Thompson has appealed.

As described in the plat and field notes upon which the entry is based the claim is of very irregular shape. One end line is over eight hundred feet in length, while the other is only two-tenths of a foot in length, and a large part of the claim is over six hundred feet in width, the distance between the side lines at the widest point being over nine hundred feet.

It appears from the record that the mineral deposit on account of which the claim was located is of horizontal or blanket formation and is probably co-extensive with the limits of the location. An assumed lode line of three courses and of zigzag form is represented on the official plat, so extended apparently on the theory that a greater width than six hundred feet might be thus embraced within the side lines of the claim.

The purpose of the amended survey required by your office was to bring the claim within the limits as to width provided by statute for the location of lode mining claims.

The appellant contends, in substance, that the present survey accords in principle with the doctrine of the case of Homestake Mining Company (29 L. D., 689), and therefore should be accepted. In that case there were a number of exclusions from the claim applied for, leaving two small tracts widely separated from each other, for which entry had been allowed, though it appeared that the point of principal discovery had gone with the exclusions. It was shown that the claim was located upon a horizontal or blanket lode which covered the entire area within the limits of the side and end lines, as well the said two small tracts as the point of principal discovery and other

excluded portions of the claim. One of the questions was whether the location could be sustained notwithstanding the loss of the point of original discovery. As the ore body was shown to extend uninterruptedly over the entire claim, including the two small tracts, the Department considered the apex of the lode as co-extensive with the distance between the side lines of the location, and held that the loss of the original or principal discovery by its inclusion in some other mineral claim did not affect the validity of the location. The case goes no further, and is in no sense authority for the proceeding attempted in the case at bar. There is nothing in the principle to justify the extension of a lode line in the zigzag form here presented, whereby the distance between the side lines of the claim is made to exceed the maximum width of six hundred feet allowed by law in the location of vein or lode claims. (Sec. 2320, Revised Statutes.) On this question the decision of your office is manifestly right, and is hereby affirmed.

There is another equally fatal objection to the entry, not mentioned by your office. It has been stated already that one of the end lines of the claim is only two-tenths of a foot in length, while the other is over eight hundred feet in length. Neither of these lines can be considered an end line within the meaning of the statute. As vein or lode claims may not be located to exceed six hundred feet in width, it is manifestly not within the contemplation of the statute that an end line in case of a blanket vein, such as here involved, may exceed that distance in length. Certainly not, unless there be some justifiable reason for it, which does not appear in this case. And while there is no express provision to govern the length of an end line where within the general limitation of six hundred feet the Department is of opinion that a line less than three inches in length is not within the spirit or intent of the statute. The end lines, required in all cases to be parallel to each other, are important features of a vein or lode location (The Hidee Gold Mining Company, 30 L. D., 420), and the statute (Sec. 2320) clearly contemplates that such lines shall have substantial existence in fact and, in length, shall reasonably comport with the width of the claim as located.

The order of your office for an amended survey will therefore be enlarged so as to require end lines of the claim to be established and shown according to law.

REPAYMENT—OVERCHARGE—NON-ALIENATION AFFIDAVIT.

PABLO BALDEZ.

An applicant for repayment of money paid by reason of an overcharge for area in excess of that actually embraced in the entry, will be required to furnish non-alienation affidavit or to show fully the nature, terms and conditions of any sale and conveyance of the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 1, 1906.* (C. J. G.)

A motion has been filed by Pablo Baldez for review of departmental decision of November 17, 1905- (not reported), affirming the action of your office requiring him to furnish additional evidence in support of his claim for repayment of the overcharge paid by him on preemption cash entry No. 1743, Las Cruces, New Mexico.

In passing upon this case on appeal, following the description in the letters of your office, Baldez's claim was treated as an application for repayment of excess purchase money, that is, money paid for a number of acres embraced in an entry over and above the area allowable under the preemption law. But his claim for repayment is in fact for an overcharge, that is, he was charged and he paid for a greater number of acres than was actually contained in the entry. The tract purchased by Baldez was represented in his cash certificate as containing 167.44 acres, whereas the true area was 147.48 acres. In such a case it has been held that "repayment may be allowed of money paid for land in excess of the area actually embraced within the entry." W. J. Chambers (7 L. D., 32). However, as a prerequisite to repayment your office called upon Baldez to furnish evidence showing that he had not alienated the land under his entry. This requirement was undoubtedly on the theory that if he sold the land embraced in his entry the assignee might be the proper party to whom repayment of the overcharge should be made. The required evidence was not furnished, but it is urged that the claim arising as it does "from an overcharge and not from the cancellation of an entry," the assignee of the land would have no right to repayment but that the right would remain in the original entryman.

It is not believed the distinction contended for warrants the waiving of a requirement of a non-alienation affidavit or in the event of sale, of a disclosure of the nature, terms and conditions of such sale, for as said in the decision complained of, "it is exclusively the province of the land department to determine, in case of alienation, whether the claim for repayment passes with the land to the assignee, and said department is therefore entitled to all the facts in each case." The proper course in this case would have been to require either a non-alienation affidavit or full showing as to the nature, terms, and conditions of any sale of the land and conveyance thereunder. You will make this requirement giving a reasonable time for compliance therewith.

The departmental decision of November 17, 1905, and the decision of your office are accordingly modified.

MISSOURI, KANSAS AND TEXAS RY. CO.

By opinion of March 3, 1906, approved by Secretary Hitchcock, Assistant Attorney-General Campbell, upon reconsideration of the matters involved in his opinion of March 14, 1905, 33 L. D., 470, reaffirms and adheres to the views therein expressed.

CONTEST—NOTICE—PUBLICATION—AFFIDAVIT.

KRAWL v. PETTENGILL.

Where the affidavit filed as a basis for an order of publication of notice of contest against an entry does not specifically allege that the entryman is a nonresident of the State or Territory in which the land is located, it should show the date or dates upon which inquiries as to the entryman's whereabouts were made, that they were made with a view to obtaining personal service of the notice, and that at that time the contestant was prepared to make personal service of the notice if the entryman were found within the State or Territory wherein the land is situated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 8, 1906.* (D. C. H.)

On October 16, 1901, Charles Z. Pettengill made homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, T. 25 N., R. 20 W., Woodward, Oklahoma, land district, against which William Krawl on April 11, 1903, filed affidavit of contest alleging abandonment and failure to establish residence upon the land, and that the entryman's absence from the land was not due to service in the army or navy of the United States. Notice of contest was issued on the same day, and July 14, 1903, was fixed as the day for the taking of the testimony before the local officers. On June 30, 1903, contestant's attorney filed his affidavit to procure an order for service of notice by publication, in which he alleged that—

he has made diligent search and inquiry for the defendant; that he has made personal inquiry of the postmaster at Ellendale, O. T.; also of the postmaster at Lathrop, a postoffice near the land, that being the nearest postoffice to the land involved, as to the place of residence or whereabouts of said ——— and that he made the like inquiry of Hayden Parsons, ——— Hayes, also at Woodward, O. T. record address of contestee, who reside in the immediate neighborhood of said land, and from his own personal knowledge as well as the information acquired from said parties, states that the said Charles Z. Pettengill abandoned said land and went to parts unknown in the state of unknown on or about ——— day of August, 1902; that he has since that time been absent from said land and that his place of residence is unknown and on account thereof a personal service of the notice of said contest cannot be made, wherefore affiant asks for an order to serve said notice by publication.

Notice by publication issued on the same day, June 30, 1903, and appears to have been duly given as required by the Rules of Practice.

On the day fixed for trial the contestant appeared in person and by attorney. The defendant specially appeared by attorney and moved to dismiss the contest for want of jurisdiction for the reason that the service of the notice by publication had not been made in accordance with the Rules of Practice, which motion was overruled by the local officers and the defendant excepted to said ruling. The defendant's attorney again stated that he appeared specially and moved that the contest be dismissed on the ground that the defendant was in the military service of the United States at the time the affidavit of contest was made and filed with said motion the unsworn statement of the officer in command of defendant's company to that effect, which said motion was also overruled by the local officers, and exceptions thereto reserved by the defendant. The plaintiff then introduced testimony in support of the allegations in the contest affidavit, at the close of which the attorney for the defendant again moved that the contest be dismissed for the reason that the evidence submitted by the contestant was not sufficient to prove the allegations of the contest.

The local officers found that while it appeared that the defendant had abandoned the land and failed to improve and cultivate same as required by law, the testimony failed to show that the alleged absence of the entryman from the land was not due to his employment in the military service of the United States and they therefore recommended that the contest be dismissed. Contestant appealed to your office, which, by decision of April 27, 1905, sustained the action of the local officers in overruling defendant's motions to dismiss the contest as hereinbefore stated, but reversed their action in recommending that the contest be dismissed for want of proof as to the non-military service of the entryman and held that the evidence sustained all the allegations set forth in the affidavit of contest and that the entry should be canceled.

The defendant has appealed to the Department, and assigned errors in substance as follows:

(1) Error in holding that the service of the notice of contest was sufficient and in accordance with law.

(2) Error in finding and holding that the evidence was sufficient to sustain the charges of the contest affidavit and to warrant the cancellation of the entry.

The first question to be considered is whether or not the service of the notice of the contest was sufficient to satisfy the requirements of the law, or, in other words, was the affidavit filed by contestant as the basis for the order of publication sufficient to warrant such service. Rule 9 of practice requires that "Personal service shall be made in all cases where possible if the party to be served is resident in the state or territory in which the land is situated," and rule 11 authorizes service

of notice by publication only when it is shown after the exercise of due diligence that personal service cannot be made. The affidavit upon which the order of publication in this case was made does not state when, or for what purpose, the inquiries as to the whereabouts of the defendant were made, or that contestant was prepared to make personal service upon the defendant could he have been found in the Territory of Oklahoma, where the land is situated.

In the case of *E. E. Duff v. Edmonia Dautel*, decided by the Department on April 18, 1905 (unreported), it was held that the affidavit filed as the basis for an order of publication "should show, among other things, the date or dates upon which inquiries as to the contestee's whereabouts were made, that they were made with a view to obtaining personal service of the notice; and that at that time the contestant was prepared to make personal service of the notice upon the contestee, if he could have been found within the State or Territory wherein the land lay." The reason for the ruling that the affidavit should show the date or dates upon which the inquiries as to the whereabouts of the contestee were made is clear and apparent. The law recognizes the fact that although the defendant may be once absent from the jurisdiction he may return thereto, and his absence cease to be an existing fact. It should therefore appear from the affidavit that the endeavor to ascertain the whereabouts of the defendant, as required by rule 11 of practice, was made at a time so reasonably near the date of the filing of said affidavit as to satisfy the local officers of the absence of the defendant from the jurisdiction at the time when they are called upon to act judicially in the matter, and when the order of publication is to take effect. The affidavit in question clearly did not meet the requirements of the law; therefore did not furnish a good and sufficient basis for the order of publication.

It is stated in your said decision that inasmuch as the record shows that at the time service was made in this case, the defendant was a non-resident of the State, he therefore should not be heard to question the sufficiency of the affidavit used as a basis for publication in so far as it relates to the degree of diligence exercised in attempting to secure personal service, citing as authority for such holding, 5 L. D., 456.

It will be noted that the facts in the case at bar and the one cited by your office are materially different. In that case the affidavit of diligence was adjudged sufficient and it was alleged in said affidavit, among other things, that the defendant was not a resident of the State of Nebraska, where the land was situated, and that personal service could not be had upon him in that State, and the defendant having admitted that at the time the said affidavit was filed and the order for service by publication was issued, he was actually residing

in the State of Illinois, it was held that under such circumstances he should not be allowed to question the truthfulness of the affidavit.

In the case at bar there is no averment in the affidavit filed as the foundation for the order for service of notice by publication that the defendant was a non-resident, and no admission by him to that effect, and as the said affidavit does not conform to the requirements of rule 11 of practice as interpreted by the Department in the unreported case of *Duff v. Dautel*, hereinbefore quoted, it was not sufficient to authorize service by publication, and the fact that your office finds from the record of the testimony that the defendant was a non-resident does not cure the error, for, as has been repeatedly held by the Department, the affidavit must show upon its face all the facts necessary to authorize service by publication, or no jurisdiction will be conferred upon the local officers.

Apart from the question of the insufficiency of the affidavit as a basis for the order for service by publication, it is found upon careful examination of the record that the proof submitted at the hearing is not sufficient, in the opinion of the Department, to show that the entryman's absence from the claim was not due to his employment in the army, navy or marine corps of the United States, as charged in the affidavit of contest, and for this reason also the contest should not be sustained.

This leaves the matter between the entryman and the government, and in view of the long military service of the entryman as shown by the record, the Department is unwilling to cancel the entry in his absence. The decision of your office is reversed. The contest will be dismissed and the entry will remain intact. (Sec. 2308, Revised Statutes.)

TIMBER AND STONE ACT—NON-ALIENATION AFFIDAVIT.

JOHN C. LONG.

An applicant to purchase under the timber and stone act does not become the owner of the land applied for, with legal right to sell, mortgage, or otherwise encumber the same, until the required proof has been furnished, the purchase price tendered and received, receipt given therefor, and final certificate issued, and at any time prior thereto the land department may require the applicant to furnish an affidavit of non-alienation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 8, 1906.* (J. L. McC.)

John C. Long, on September 15, 1902, applied to purchase, under the timber-land act, lots 1, 2, and 6, and the W. $\frac{1}{2}$ of lot 7, Sec. 2, T. 28 N., R. 10 E., Susanville land district, California.

It appearing from the record that said lands were included in a temporary withdrawal for forestry purposes, by departmental order of October 15, 1902, your office, on August 15, 1903, rendered a decision rejecting said application. Long appealed, and the Department, on October 7, 1903, reversed said decision, and directed that the applicant "be allowed to complete his purchase in accordance with the terms prescribed by the statute."

The application was accordingly allowed, November 3, 1903; and on January 16, 1904, Long submitted final-proof testimony. On that day a special agent of your office appeared at the local office, and cross-examined the entryman and his witnesses. This led to a delay in action upon said proof; and it was not until January 24, 1905, that the claimant was notified by the local officers that upon receipt of \$406.50, and a non-alienation affidavit, his case would be taken up with a view to issuing final receipt.

From this action of the local officers Long appealed; and your office, on July 6, 1905, affirmed the action of the local officers.

Long has appealed to the Department. The gist of his contention is to be found in the following extracts from his appeal:

Appellant showed that he was duly qualified; made legal proof that the land was such as the act provides for the sale of; tendered his money and asked to be permitted to pay for and enter the land; in short, did all he possibly could to perfect his claim. He was, however, denied the right to make payment for and enter the land, which the act awards him; his proof was held up and not examined for a year; all contrary to his wishes, as well as contrary to the terms of the act, and not by reason or in consequence of the least fault, failure, or neglect on his part; and now a demand is made that he furnish an affidavit for which there is no requirement of law whatever. . . . When he made his proof (which is admitted to be perfect), and tendered the coin to pay for his land, he had done everything in his power to perfect his entry; he thereby acquired a perfect and complete equity to have, and was entitled to have, the land patented to him at any time upon payment of the purchase price; and if at any time after making his proof he had seen fit to sell, or bargain to sell, or to mortgage or otherwise encumber the land, he would have been legally entitled to do so; and whether he did or did not so sell, bargain to sell, or encumber, the land, is a question in which the government has not the slightest interest.

It appears from the record, and, indeed, is clearly indicated by the language of the appellant (*supra*)—that he "tendered his money," but was "denied the right to make payment for and enter the land"—that the purchase price tendered was not accepted. His proof was *not*, by the local officers, admitted to be perfect; nor has it been so admitted by your office, or it would not have rendered the adverse opinion from which he has appealed.

The contention of the appellant that his presentation of final proof (since held to be sufficient), and his tender of payment (which was rejected), entitled him to patent, is substantially the same as that

made by defendant Hays in the case of *Todd v. Hays*, in which the Department exposed the fallacy of said contention thus (34 L. D., 371, 374):

Heretofore it has always been understood by the Department that joint action of the applicant on the one hand, and of the local officers on the other, was requisite to make an entry of a tract of land; but if this contention be correct, any person wishing to make entry of a given tract can do so unassisted. . . . The money tendered must have been received, and receipt issued therefor, in order to render such action "equivalent to an entry." As was said by the Department in the case of *Thomas v. St. Joseph & Denver City Railroad* (3 C. L. O., 197), quoted with approval in *Gilbert v. Spearling* (4 L. D., 463), and again in *Iddings v. Burns* (8 L. D., 224):

"Each of the three elements of which this transaction is composed forms an essential part thereof—the application, the affidavit, and the payment of the money; and when the application is presented, the affidavit made, and the money paid, an entry is made—a right is vested."

Further in support of the same ruling the Department (in said *Todd-Hays* case) cited *Witherspoon v. Duncan* (4 Wall., 210, 219); *Hastings, etc. R. R. Co. v. Whitney* (132 U. S., 357, 363); *Jones v. Northern Pacific Ry. Co* (34 L. D., 105, 111).

A similar conclusion is reached by the Department in the case of *Bowlby v. Hays* (34 L. D., 376), which cited in support of the same ruling, *Hoofnagle v. Anderson* (7 Wheat., 212, 214); *Brush v. Ware* (15 Pet., 93, 110); *Parsons v. Venzke* (164 U. S., 89, 92)—the last of which says:

Whenever the local land officers approve the evidences of settlement and improvement, and receive the cash price, they issue a receiver's receipt. Thereby a contract is entered into between the United States and the pre-emptor, and the contract is known as an "entry." The effect of the entry is to segregate the land entered from the public domain.

Until this appellant had not only tendered the purchase money, but until it had been received, and receipt given therefor, and final certificate issued, had he become owner of the land, with legal right to sell, mortgage, or otherwise encumber the same. The action of your office in requiring a non-alienation affidavit before issuing final certificate was therefore correct, and is hereby affirmed.

RECLAMATION ACT—SETTLEMENT RIGHTS—IMPROVEMENTS.

GEORGE ANDERSON.

No such rights are acquired by settlement upon lands embraced in the entry of another as will attach upon cancellation of such entry, where at that time the lands are withdrawn for use in connection with an irrigation project under the act of June 17, 1902; nor is there any authority in said act for purchase by the government of the settler's claim or of the improvements placed upon the land by him.

Secretary Hitchcock to the Director of the Geological Survey, March 10, 1906. (F. L. C.) (J. I. P.)

I am in receipt of your communication of the 5th instant, submitting for my consideration an agreement by Mr. David C. Henny, on behalf of the United States, with Mr. George Anderson, whereby the latter agrees to sell to the United States, for the sum of \$3,000, the improvements on lots 8 and 9 in section 7, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 18, T. 35 N., R. 25 E., W. M., and all his right, title and interest therein, and all claim to said lands, for use in connection with the Okanogan project, in Washington. The agreement is accompanied by an affidavit of disinterestedness executed by the engineer.

The facts in this case, as disclosed by the correspondence, appear to be as follows:

Mr. Anderson, who, at the time, was qualified to make entry under the homestead law, settled on this land in 1892, the land at that time being covered by a homestead entry. Anderson subsequently contested the entry, which contest was decided adversely to him. Later he filed a relinquishment obtained from the mother of the minor heir who had succeeded to the entry. He then made homestead entry of the land, which was accepted by the local office but was rejected by the General Land Office and the prior entry permitted to remain intact. The prior entry was canceled, however, by the General Land Office on January 13, 1906, and Anderson advised that he had thirty days' preference right to make entry of the land. When he submitted his application, however, it was rejected by the local land office for the reason that the land had been withdrawn from all forms of entry (first form of withdrawal), under the reclamation act, on July 30, 1904.

Since Anderson settled on the land he has placed improvements thereon, the reasonable value of which is now placed at \$3,000, and you have submitted this agreement, entered into between the engineer and Anderson, with the recommendation that if in the opinion of the Department there is authority of law for the purchase of the rights of Mr. Anderson, and his improvements upon this land, the agreement be approved by the Secretary and returned to your office.

After careful consideration of this matter, I have to advise you that in the opinion of the Department there is no authority of law for the purchase of the so-called rights of Mr. Anderson, or of the improvements he has placed upon this land.

At the time Anderson settled upon this land it was covered by a homestead entry, and by that settlement he acquired no rights whatever against either the entryman or the government. See *McMichael v. Murphy et al.*, 20 L. D., 147, and authorities there cited.

It is true that the Department has held that where a settler is residing on a tract covered by an entry at the date of cancellation thereof, his rights as a settler attach *eo instanti*, without any specific act of settlement on his part, where he is in possession of the tract when the entry is canceled. See authorities above cited and *Pool v. Moloughney*, 11 L. D., 197, and authorities there cited. But that rule does not apply in this case, for the reason that in paragraph 7 of the circular approved by the Department June 6, 1905, it is held:

When an entry for lands embraced within a withdrawal under the first form is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal, and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated either by a successful contestant or any other person.

The only rule for the purchase of improvements is found in paragraph 8 in said circular approved June 6, 1905, which provides:

In the event any lands embraced in an entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890), under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

Paragraph 9 provides a method for determining the value of such improvements.

As Anderson never had any entry, the rule above quoted, as to the purchase of improvements, does not apply to his case.

It will be seen, therefore, that this Department is without any authority to authorize the payment from the reclamation fund of \$3,000, or any other sum, for Anderson's so-called rights and improvements.

The agreement enclosed with your letter of the 5th instant is returned herewith, not approved.

RECLAMATION ACT—LEASE OF RESERVED OR PURCHASED LANDS.

OPINION.

The Secretary of the Interior has authority to make temporary leases of lands reserved or acquired by purchase for use in connection with an irrigation project contemplated under the provisions of the act of June 17, 1902, where use under the proposed lease will not interfere with the use and control of the lands when needed for the purposes contemplated by the reservation or purchase.

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 10, 1906. (E. F. B.)

I am in receipt, by reference, of a letter from the Director of the Geological Survey re-submitting to the Department the question whether lands purchased for reclamation purposes may be leased for one or more years pending construction, or until such lands are needed. The letter is referred to me for opinion upon the question submitted in said letter.

This question was first submitted to the Department by the Director of the Geological Survey in his letter dated August 31, 1903, stating that the reclamation service was about to acquire lands that will be flooded by the Salt river reservoir, and as it will take several years to construct the dam and flood the lands, the government will be in possession of several tracts of good farming lands for two or three years. He stated that if it were possible to lease the lands it would afford a great saving to the government, and he requested "the views of the Department upon the proposition to purchase these lands on terms involving leases as indicated, for one or more years, until the lands shall be needed for the use of the reservoirs. Also whether lands so purchased could be leased to others than the former owners under like conditions."

In replying to this request the Department, in its letter of January 28, 1904 (32 L. D., 416), said that, as a general rule, an executive officer has no authority to use property of the United States for any purpose other than that for which it was acquired. That as there is no authority to use property acquired under the provisions of the reclamation act except for the purpose of constructing and maintaining reservoirs, he cannot use such property in any manner not directly involved in the construction of them.

It was said, however, that "if in any case it be found that land can be purchased for a less price if arrangements can be made to allow the vendor to retain possession until the time when the land is actually needed for use by the government, there is full authority under the act to make such arrangements."

This view contemplates that the consideration to be paid by the vendor for the use and occupation of the land until it is needed by the government is the diminished price to be paid by the government for the land.

There does not seem to be any difference in principle in acquiring property under an agreement to allow the vendor to retain the use and occupancy of it after the purchase and in acquiring such property by purchase without condition and afterward leasing it to the vendor or to another. In either case it is a lease or permission to use and occupy property of the United States.

It may be stated as a cardinal principle that the Secretary of the Interior has no authority, under his general power of supervision and control over the public lands, to lease them, unless expressly authorized by Congress. The disposal of the public lands having been specially provided for, any other mode or manner of disposition is excluded, being impliedly prohibited.

But while the lands acquired for the construction and operation of reservoirs are lands belonging to the United States, they are not public lands within the technical meaning of that term and are not controlled by the laws governing the disposition of public lands. Hence, the fundamental proposition involved in this inquiry is whether property of the United States acquired for particular uses may be temporarily leased by executive authority for other uses, where such use and occupancy will not interfere with the use of the property for the purpose contemplated by its acquisition, whenever it is needed for that purpose.

There does not appear to be any constitutional or statutory inhibition against the exercise of such power, and in the absence of an express prohibition as to the particular property it may be safely asserted that where public property is placed in the custody and care of any of the executive departments to be appropriated and used for a particular purpose the head of such department may, until the property is actually needed for the purpose intended, exercise his judgment and discretion as to the proper care and disposition of such property, and any use of it not incompatible with the purpose intended is neither a violation of law nor an abuse of the supervisory authority and discretion reposed in the executive department over matters confided to its care.

There can be no dissent from the proposition that property of the United States can not be taken or employed by executive authority for any purpose other than that for which it was acquired, but the proposition must be taken in its proper sense to mean that the property can not be diverted to other uses. A temporary use or disposition of the property that will not interfere with the proper use and control of the lands when needed for the purpose contemplated is not a diversion of it to other use, but may be in furtherance of the object for which the property was acquired. This would seem to be especially so with reference to lands acquired under the reclamation act.

The third section of the act of June 17, 1902 (32 Stat., 288), authorizes the withdrawal of lands required for the construction of irrigation works under said act. The lands withdrawn for such purpose are permanently appropriated for a specific purpose. The seventh section of the act authorizes the Secretary of the Interior to acquire rights or property, by purchase or by condemnation, under judicial

process, whenever the acquirement of such right or property becomes necessary in carrying out the provisions of the reclamation act, and to pay from the reclamation fund sums which may be needed for that purpose. The property so acquired, either by purchase or reservation, is public property placed by the act under the control of the Secretary of the Interior, for use in the construction of irrigation works for the storage, development and diversion of waters. He is required by the act to make examinations and surveys, to estimate the cost of construction of all contemplated works, the quantity and location of land which can be irrigated therefrom, and "all facts relative to the practicability of each irrigation project." The cost of construction is an important factor in determining the practicability of an irrigation project. Therefore any economical use of the property by which such cost can be diminished, or the fund increased, not inconsistent with the purpose of the irrigation act, is a material fact that may be considered in determining the question. The power to determine whether an irrigation project is practicable as a financial scheme, necessarily implies the right to so use and control the property, while the work is in progress, as to secure the construction of the works at the lowest cost. If the land needed for the construction of the works can be made productive by any practical use not inconsistent with the object to be attained in the construction of the works, but in furtherance of it, no reason appears why it may not be so used, there being no express prohibition against it.

In the letter of January 28, 1904, *supra*, it was suggested that if a plan for the leasing of such lands was determined upon it would be necessary to designate some officer to execute the leases, to receive the rental accruing thereunder, to deposit the same in the United States treasury or some other depository of government money, and to devise some plan by which the money could be withdrawn and applied to the work of construction.

The act of March 3, 1905 (33 Stat., 1032), to which attention has been called by the Director in his letter and which has received a liberal interpretation by the Comptroller of the Treasury, obviates these difficulties. That act provides:

That there shall be covered into the reclamation fund established under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said reclamation act.

I am of the opinion that the Secretary of the Interior has authority to make a temporary lease of any of the lands acquired for any irrigation project, provided the use of the land under the proposed lease

will not interfere with the use and control of the lands when they are needed for the purposes contemplated by the purchase or reservation of such lands.

Approved:

E. A. HITCHCOCK, *Secretary.*

RAILROAD GRANT—PATENTED LANDS—NORTHERN PACIFIC ADJUSTMENT.

NORTHERN PACIFIC RAILWAY COMPANY.

The provisions of the act of July 1, 1898, are applicable to patented lands, whether patented before or after the passage of the act, if such lands are in dispute between the company and the individual claimant and belong to either of the classes described therein, and where patents issued to individual claimants prior to the passage of the act, under rulings then in force, which under rulings now governing would have to be held to have been improperly issued, the conflicting claims to such lands are subject to adjustment under the provisions of said act, provided the company has not, by the selection of other lands in lieu of those in controversy, or otherwise, abandoned its claim thereto.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 14, 1906.* (F. W. C.)

With your office letter of the 7th instant was transmitted, in duplicate, what is denominated as list No. 52, State of Montana, embracing certain lands included in individual claims within the limits of the Northern Pacific land-grant in the State of Montana, the same being submitted for approval under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), preliminary to inviting the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, to make relinquishment thereof under the provisions of said act, the individual claimants having elected to retain the lands included in their several claims.

It is gathered from your said letter of transmittal and from informal inquiry of your office that the several individual claims included in said list were all patented prior to the passage of the act of July 1, 1898, under rulings then in force, which held the lands involved to have been excepted from the operation of the Northern Pacific land-grant; but that under present rulings of the courts the departmental action was improper, there being no such claims as served to defeat the operation of said grant; so that, unless barred by the statute of limitations, the individual claimants would be likely to lose the lands upon the suit instituted by the railroad grantee for possession of the lands under the grant. It is learned that the lands were only pat-

ented after contest before this Department and that the railroad grantee has not, by the selection of other lands in lieu of those here in question, which are within the primary limits of its land-grant, abandoned its claim to the lands involved.

By the decision of the supreme court in the case of *Humbird et al. v. Avery et al.* (195 U. S., 480, 506), it is held, in effect, that the act of 1898 is applicable to lands patented both before and after the passage of the act, if such lands are in dispute and belong to either of the classes described in said act. Under the circumstances herein detailed it can be safely said, although these lands were patented to the individuals prior to the passage of the act of July 1, 1898, they nevertheless remained in dispute, as a case involving the principle which was determinative of the contests between these several individual claimants and the railroad company was prosecuted to the Supreme Court of the United States, resulting in a decision in favor of the company (*Northern Pacific Railroad Company v. De Lacey*, 174 U. S., 622), and it is by reason of said decision that it is now held that these patents were improperly issued upon these individual claims. They are otherwise in the classes described in the act of 1898, and the entire matter considered, the Department herewith returns the list, approved, with instructions that one copy be retained in your office and the other transmitted to the Northern Pacific Railway Company with an appropriate request for relinquishment of the land therein described under said act.

SCHOOL LANDS—MINING CLAIM—UNSURVEYED LAND—ACT OF FEBRUARY 22, 1889.

STATE OF SOUTH DAKOTA *v.* TRINITY GOLD MINING COMPANY.

The grant of sections sixteen and thirty-six made to the State of South Dakota for school purposes, by the act of February 22, 1889, took effect on the admission of the State into the Union, as to lands at that date identified by the government survey, but as to such of the indicated sections as had not been surveyed at the date of the admission of the State, the right of the State does not attach unless and until identified by survey, and if at the time of survey they are known to be mineral in character, they are excepted from the grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) March 16, 1906. (G. J. H.)

December 28, 1903, the Trinity Gold Mining Company made entry No. 1466 for the Llewellyn and seven other lode mining claims, in T. 5 N., R. 2 E., Rapid City, South Dakota.

The records of your office show that the exterior boundaries of the township in which these claims are situated were established by official survey in November, 1899, but that the section lines have not yet been run. It appearing, however, that the larger part of this group of claims is located in what, when surveyed, will be section 36, the State was notified of the allowance of the entry in question and afforded opportunity to show cause, if any, why the entry should not be permitted to stand, sections 36 being included in the grant to the State for school purposes made by the act of February 22, 1889 (25 Stat., 676).

December 24, 1904, the State filed a protest against the entry, alleging, in substance and effect, that the land had passed to the State under its school grant.

January 13, 1905, your office dismissed the protest, on the ground, in substance and effect, that the public surveys have not been extended over the lands in question, and until it is definitely ascertained by government survey what particular lands will be embraced in the sections granted to the State for school purposes, no rights attach under the grant to any specific lands.

The State has appealed to the Department.

It is contended to support the appeal that the grant of school lands made by the act of February 22, 1889, *supra*, is a grant *in praesenti*; that the right of the State thereunder attached upon its admission into the Union, whether at that date the granted sections were surveyed or unsurveyed; and that lands containing valuable deposits of mineral were not excepted from the grant unless known to be mineral in character at the time of the State's admission.

The State does not allege that the particular lands here in controversy are nonmineral, or that they were not known to be mineral at the date of the State's admission, but is apparently proceeding upon the assumption that they were not known to be mineral on that date.

The provisions of the school grant to the State of Utah (sections 6 and 10, act of July 16, 1894, 28 Stat., 107), are in all essential respects identical with those of the grant here in question. In construing the Utah grant the Department has uniformly held that it took effect on the admission of the State into the Union, as to lands at that date identified by the government survey (*State of Utah v. Allen et al.*, 27 L. D., 53; *State of Utah*, 29 L. D., 418, 419; *Law v. State of Utah*, 29 L. D., 623; *State of Utah*, 32 L. D., 117; *Helen Tibbals*, 33 L. D., 223); but as to such of the indicated sections as had not been surveyed at the date of the admission of the State, the Department held, in the case of Mahogany No. 2 Lode Claim (33 L. D., 37), that—

the right of the State to the lands mentioned does not attach unless and until identified by the government survey (*State of Colorado*, 6 L. D., 412; *Barnhurst*

v. State of Utah, 30 L. D., 314); and if at that time they are of known mineral character they are reserved from the grant to the State. (See State of Utah v. Allen *et al.*, 27 L. D., 53; State of Utah, 32 L. D., 117.)

This decision is in harmony with decisions of the Supreme Court of the United States. (See Cooper v. Roberts, 18 How., 173, 179; Heydenfeldt v. Daney Gold and Silver Mining Co., 93 U. S., 634.)

The States of South Dakota and Montana (with others) were admitted under the same enabling act (*supra*) and the grant for school purposes made by said act is the same as to both of said States. In instructions to the Director of the Geological Survey, August 9, 1904 (33 L. D., 181), the Department, construing the school grant to the latter State, said:

The people of Montana by adoption of a constitution accepted the grant, which became operative by executive proclamation of November 8, 1889 (26 Stat., 1551), and title as of present grant for the specific sections vested in the State subject to their future identification by the public land surveys. The later act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276, Revised Statutes, saves the rights of settlers before survey, but, otherwise than for protection of settlers, the grant of the specific sections is not affected. (Noyes v. State of Montana, 29 L. D., 695.)

It is urged on behalf of the State that this construction of the school grant by the Department amounted to a determination that the grant was one *in praesenti*, and that, therefore, mineral lands are not excepted therefrom unless known to be mineral at the date of the State's admission into the Union.

The question involved and considered by the Department in those instructions was whether or not the State was entitled to the school sections in certain townships formerly embraced within an Indian reservation, and it was held that the State is "entitled to claim the specific sections in place within the boundaries of the former reservation where they have not been appropriated by a *bona fide* settler prior to their identification by survey." No question touching the rights of the State as between it and mineral claimants was involved or discussed, and it was not intended by the language there employed to overrule or in anywise modify the decision in the case of Mahogany No. 2 Lode Claim, *supra*, rendered but two months before. The decision in that case is controlling here.

It is further urged on behalf of the State, in substance and effect, that as the exterior lines of the township in which the land in question is situated have been established by government survey, thus fixing the south and east lines of what when surveyed will be section 36, the section is "as definitely designated as if the township had been fully surveyed," and the mineral claimant could therefore have ascertained that the land was within a school section and should not have made location thereof unless the lands were known to be mineral at the date of the State's admission.

It appears from the abstract of title in the record that seven of the eight claims embraced in the entry in question were located prior to the survey of the township lines, and also prior to the admission of the State into the Union. It can not be said, therefore, that the claims were located with knowledge that the land was embraced in a school section. But in any event, the Department has held (*Barnhurst v. State of Utah*, 30 L. D., 314), that "the survey of the township lines is not a survey of a section within that township, two sides of which are described and fixed by the township lines." (See also *Bullock v. Rouse*, 81 Cal., 590.)

Your office decision dismissing the protest is affirmed.

DESERT LAND ENTRY—RECLAMATION—CULTIVATION.

BRANDON *v.* COSTLEY.

The desert-land act of March 3, 1877, as amended by the act of March 3, 1891, requires that sufficient water be conducted upon the land embraced in the entry to reclaim it from its desert character and render it suitable for agricultural purposes, and that one-eighth of the land be placed under cultivation.

As proof of cultivation within contemplation of the desert-land act actual tillage must as a rule be shown.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 19, 1906.* (C. J. G.)

An appeal has been filed by Thomas J. Brandon from the decision of your office of May 31, 1905, dismissing his contest against the desert land entry of Rebecca Costley for the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 5 and 6, Sec. 23, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, T. 8 N., R. 41 E., Blackfoot, Idaho, and holding said entry intact.

The entry was made July 25, 1902, final proof was submitted thereon December 21, 1903, and final certificate issued January 5, 1904. Brandon's affidavit of contest was filed January 9, 1904, in which he alleged that—

the said Rebecca Costley has failed to comply with the law in that she has not cultivated or caused to be cultivated $\frac{1}{8}$ of the land and has not conducted water upon the land embraced in said entry so as to irrigate and reclaim the same from its former condition to such extent that it will produce an agricultural crop, and that water has not been distributed through and by means of ditches over all the lands in each legal subdivision of said entry and that said defaults continue down to this date.

A hearing was ordered and had before the local officers, who rendered decision recommending cancellation of the entry. Upon appeal your office reversed their action, dismissed the contest, and held the entry intact, as stated.

It appears that R. J. Costley, husband of contestee, made desert land entry for this same land in 1898, but, as testified to by him, at the expiration of four years, thinking he did not have sufficient water to irrigate the land, he relinquished the same and his wife made the entry in question. He turned his improvements over to her and had his water stock in what is known as the Dewey canal transferred on the books of the company to her in her name. This is said to have been done in July, 1903, but the certificate of water stock—thirty-four shares—was not actually issued to her until December 21, 1903, the date of final proof. She also held certificate for three shares of water stock in the Last Chance canal.

In her final proof Mrs. Costley stated, among other things:

Water has been conducted upon said land during the fall of 1903, said land has been reclaimed to such extent that it will now produce an agricultural crop. Two main ditches, dimensions 3 feet wide, capacity about 200 inches, two laterals about same size and capacity, \$1035.00 expended in the aggregate which equals more than \$3.00 per acre of the entire area thereof. Water has been distributed upon each legal subdivision with a view to the proper reclamation thereof, during October of 1903, about one inch per acre used, for a few days at each time, on part of it during the entire season of 1903. No agricultural crop has been raised as the water was too late for a crop in 1903, except on a portion of the land used for pasture the growth of grass has been considerably increased. 21 acres under plow and about ten acres of meadow, made as a result of the irrigation.

She also stated that there are no high points or uneven surfaces which are not practically susceptible of irrigation.

The source of the claimed water supply for the irrigation of the Costley tract is the North Fork of Snake river, through the Dewey canal, the construction of which was begun in 1898. The point of diversion from the river is a mile or more above the land. According to a plat filed in the case, which is recognized by the parties as being practically correct, the Dewey canal enters the east side of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 14, and extends in a general southwest-erly direction through the N. $\frac{1}{2}$ of said SW. $\frac{1}{4}$. The SW. $\frac{1}{4}$ of 14, which adjoins the Costley claim on the north, was entered under the desert law June 6, 1902, by one Samuel M. Maupin, upon relinquishment of L. C. Rice who made desert entry for the land in 1898 and who was at one time Secretary of the Dewey Canal Company. Maupin assigned his entry, June 12, 1902, to Alice T. Rice, wife of said L. C. Rice, and it is stated the laterals from the Dewey canal were built to water both the Rice and Costley tracts. A large portion of the expenditure credited to Mrs. Costley in her proof was undoubtedly made in the construction of said canal while the land in question was embraced in R. J. Costley's entry. Two laterals were taken out from the Dewey canal, one, the west lateral, on the west side of the SW. $\frac{1}{4}$ of Sec. 14, and extending practically on the

line between the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 22 and the NW. $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Sec. 23; the other, the east lateral, running in a southeasterly direction across the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14. These laterals, as stated, were intended to water both the Rice and Costley claims. At date of hearing it had not yet been estimated how much water Mrs. Costley was entitled to on account of her stock in the Dewey canal. It was testified that she owns one-sixth of all the water stock and one-ninth of the land controlled by the Dewey canal stockholders, which it is claimed entitles her to more than enough water to irrigate and reclaim this land.

The Last Chance canal, which one of contestee's witnesses says was completed in 1902, and another that it has been constructed "five or six years any way; may be more," enters the NE. $\frac{1}{4}$ and goes diagonally and southwesterly across lots 5 and 6 of the Costley tract. No laterals were taken out from the Last Chance canal, it being claimed on behalf of contestee that it was unnecessary owing to the fact of sufficient sub-irrigation from said canal.

The "main ditches" mentioned in Mrs. Costley's proof undoubtedly refer to the Dewey and Last Chance canals. The testimony on behalf of contestant is to the effect that prior to proof and contest the land was in its native state except three small pieces of plowing and one canal, the Last Chance, running through it. This plowing was on the southern portion of the entry, one piece being between the Last Chance and North Fork of Snake River. The pieces of plowing were measured with a fifty-foot *tape line* and found to aggregate 13.07 acres. The sage brush had not been cleared therefrom. The west lateral from the Dewey canal was made by plowing two furrows each way and cleaning them out. It would carry a very small stream of water and was not in condition to carry it all the way through, as there were low places where it would have to be banked up. The lateral did not reach the plowed ground; it went to a swale which was three or three and a half feet lower than the plowed ground, and if water had gone in that direction it would have run into this swale. This was the only ditch on the land in the fall of 1903 and water did not at that time flow in that. It crossed two legal subdivisions and was about one-half mile long. There was no water being conducted upon the land at time of contest except through a waste ditch from the Last Chance canal; there were no laterals from said canal except this waste ditch and it did not irrigate any of the plowed ground. After contest some plowing and clearing were done, more ditches made and portions of the land put in crop. But there was not sufficient water on the land in the fall of 1903 to produce a growth of grass, and the only vegetation was sage brush and some grass along the river. At no time during the fall of 1903 was there any irriga-

ting ditch upon lots 5 and 6 of Sec. 23. Water flowed in the Dewey canal for three days in October, 1903, but it backed up and overflowed the banks. The place of overflow was above point where the west lateral diverted its waters from the canal, and there was no water in said lateral during the season of 1903. No water was being distributed on the land on December 21, 1903, date of proof, except through the waste ditch from the Last Chance canal. All of the Costley claim is susceptible of irrigation from the Dewey canal except five or ten acres. Prior to final proof no agricultural crop had been raised on said claim, there was not an increased growth of grass thereon, due to irrigation, and one-eighth of the land had not been cultivated. Some of the land lying southeast of the Last Chance could be irrigated therefrom if laterals were carried out, but very little to the northwest. There were two laterals leading from the Dewey canal prior to December 21, 1903, the west one already referred to, and the east one which was only three hundred yards long and on the SW. $\frac{1}{4}$ of Sec. 14, the Rice tract, a quarter to a half mile from the Costley claim. The east lateral extended in the direction of said claim but it also ran into a sag or swale—against a knoll 4 feet higher than the ditch. The land in question would produce crops of more value than grass, as the climatic conditions are not such as to render it valuable solely for hay. But it would not in the condition it was in prior to contest produce sufficient to support stock. There were not enough laterals or ditches nor were they large enough to make grass, wheat, oats or anything else grow. And even if crops had been put out, or stock kept off, the same could not have been harvested because of the sage brush which was left on the plowed ground.

The testimony on behalf of contestee shows that prior to December 21, 1903, something like \$900 had been expended in securing a water supply and about twenty acres had been plowed. One witness estimated the acreage of the plowed ground by *guessing* and another by *stepping*. One witness saw water in the west lateral going past the southwest corner of the Rice tract in the fall of 1903 but he did not follow it down and thinks the time was after final proof advertisement. He saw water on the Costley claim prior to December 21, 1903, but it was from the Last Chance. The east lateral only extended part way across the Rice claim in the fall of 1903, but there was water in it. At date of proof there was a pond of water at the terminus of this lateral on the Rice claim, there being at that point quite a little rise. The lateral was constructed in the same manner as the west one, it was partly built in the fall of 1903 and completed in the spring of 1904. It was intended to go through to the Costley claim but the water froze up in the canal and the contractor had other work to do. It is claimed that no laterals are needed on the land

south of the Last Chance, being an increased growth of grass there due to sub-irrigation. It is said the land sub-irrigates very easily on account of the substratum of lava rock being so near the surface. It is admitted the plowed ground was not prior to contest cleared of brush, leveled nor harrowed, as the custom is not to do these things until crops are put in. On cross-examination of contestee's witnesses it was testified that water was turned into the laterals solely for the purpose of enabling her to make final proof, but on re-direct that testimony is explained by saying it was for the purpose of testing the efficiency of the irrigation system. A witness said that water was not upon every legal subdivision prior to or at date of proof, but still the land had been reclaimed at that time sufficient to produce an agricultural crop "a good many times over." It is difficult to understand to what particular part of the claim this statement refers, or to reconcile it with the other testimony in the case. One of contestee's witnesses said it was practicable to irrigate the east part of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 22 from the west lateral but that a good deal of the land has a ridge running through it and it would require another lateral to water the northwest corner of said tract. Another witness who did the plowing on this claim in the fall of 1903 testified there were fourteen and one half acres of it, in addition to the piece of plowing under the Last Chance canal, which contained six or seven acres. Nothing was done except the plowing, in doing which, when large sage brush was struck they plowed it right up or "would dodge around" it. The ground was not harrowed nor was the sage brush cleared up. He saw water going the entire length of the west lateral the first of November, 1903, and thinks half of the claim could be irrigated from it, if necessary. This lateral was the only one that conducted water to the Costley claim in the fall of 1903. Prior to December 21, 1903, water ran past the terminus of this lateral—it was turned off because they "got it down to where we wanted to go"—turned it in next evening and it ran all one night—not certain whether these two times were the only times water was in that lateral prior to December 21, 1903. The lateral terminates in a low gully but it *can* be conducted around.

Q. Was there any lateral upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, at that time?—A. No sir.

Q. State whether or not on December 21, 1903, water had been distributed through or by means of ditches over all of this land on each legal subdivision thereof.—A. No, it had not; these two fractions, this fraction you are speaking of in here there is not any lateral except the Last Chance canal.

Witness said the tract southeast of the Last Chance sub-irrigated in 1902—could not say just as much as it does now but greater portion of the tract that sub-irrigates now sub-irrigated then. The testimony

on behalf of contestee likewise shows that the land in controversy would produce paying crops of grain, the character of the land and climatic conditions not being such as to prevent the raising of such crops. At time of hearing water was flowing in both laterals and forty or fifty acres were plowed, cleared and in cultivation.

The first section of the act of March 3, 1877. (19 Stat., 377), entitled "An act to provide for the sale of desert lands in certain States and Territories," provides for the reclamation of such lands by "conducting water upon the same." The second section provides "that all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act."

The act did not specify how or to what extent land was to be reclaimed thereunder, except "by conducting water upon the same," nor did it contain any penalty or forfeiture clause for failure to properly reclaim the land. In this respect the instructions of March 12, 1877 (2 C. L. L., 1375), merely followed the language of the act. The entryman was required, as an assurance of good faith, to advance twenty-five cents per acre of the price fixed for the land at the time of filing his declaration, and he was given three years in which to submit proof of the reclamation of the land "in the manner aforesaid," and upon payment of an additional sum of one dollar per acre a patent was to be issued to him. The act granted 640 acres of desert lands, an area larger than under the pre-emption and homestead laws, because it was deemed that a lesser area would not justify the outlay of capital and labor necessary to procure a water supply, the subject of reclamation being at the time more or less problematical. The instructions of March 12, 1877, *supra*, were supplemented by those of September 3, 1880 (2 C. L. L., 1382), wherein it was said:

I am of the opinion that if it be shown that a sufficient quantity of water has been brought upon the land to irrigate the *whole* thereof, and the water is properly distributed, so that the *entire tract* is, *in fact, irrigated* in a manner suitable for cultivation, and the whole thereof is in good condition for agricultural purposes, as a practical cultivator would be likely to use the land, and in a manner that evinces the good faith of the claimant and the *actual and practical reclamation of the whole* of the land, and that an agricultural crop has been raised on some portions thereof, the proof should be deemed sufficient.

In preparing the blank forms for final proof under the act of 1877 it was deemed proper to insert questions as to the cultivation and growing of agricultural crops upon the lands entered, and upon the suggestion of your office "that there is nothing in the language of the statute requiring proof of cultivation or of the growing of agricultural crops upon the land entered as a prerequisite to the issuance of patent therefor," it was held in the case of *Wallace v. Boyce*

(1 L. D., 26), August 2, 1882, after stating that the blank forms of proof were not in contravention of the act, and that they were drawn "with direct reference to the proof of such facts as will show compliance by showing results:"

The primal question to be determined is the signification of the word "reclaim," as the same is used in the statute. It is presumable that Congress used this word in its ordinary acceptation, which, according to Webster, is:

"To reduce by discipline, labor, *cultivation*, or the like, to a desired state; to rescue from being wild, desert, waste, submerged, or the like; as to *reclaim* wild land, overflowed land, etc."

Hence, I am of the opinion that the intentment of the statute is to provide for the reclamation of such lands from their desert condition to an *agricultural* state. Congress specified water as the means to that end, but the mere conveying of water upon the land is not a fulfillment of the law, unless in sufficient quantity to prepare such land for cultivation. It would be imputing a vain intent to the statute to interpret the same as requiring a mere occasional seepage of water upon such land, which in itself would not materially change the original *status* of the same so far as agricultural purposes are concerned.

In the case of *Babcock v. Watson et al.* (2 L. D., 19), August 7, 1883, it was said:

The expression "some agricultural crop" does not refer solely to the amount of the crop; it also refers to kind. It may be grass, it may be wheat or barley, or some other crop to which the country and climate in the region of the land are generally adapted.

And in *Miller v. Noble* (3 L. D., 9), under date of July 14, 1884:

In *Wallace v. Boyce* (1 L. D., 54), this Department held substantially that final proof must show that the land from a desert condition has been reduced to an agricultural state. But in the case of *Babcock v. Watson* (2 L. D., 19), it was said, in referring to the phrase "some agricultural crop," that it meant not only the amount of the crop, but also the kind, and that it might include grass, wheat, or barley, or such other crop as the country and climate were adapted to. Hence it would seem that "results" might be shown after a sufficient lapse of time, even though no attempt was made to cultivate the land by plowing and sowing seed.

In departmental circular of February 9, 1885 (3 L. D., 385), it was said, referring among other things to the questions in the printed form for taking proof and the case of *Wallace v. Boyce*, *supra*:

There is nothing in the act that requires such proof be furnished, and in the case referred to, I said I did not think a regulation of the office that such proof be furnished can be said to be in contravention of the act. I am disposed to modify the views thus expressed as it may be a hardship in many cases to require proof of this character. The fact to be ascertained is, has the claimant of desert lands reclaimed the lands within the meaning of the act. He has three years to make such reclamation which can only be done in one way, and that is with water. It is true that evidence that such reclamation is perfect and complete will be by proof of an agricultural crop raised on such land by the aid of the water so brought on the land But it is not the only proof, and might not be at all times the best proof The act very clearly contemplates that the reclamation must be from a desert state to an agricultural one,

and that is proved where it shows that the claimant is the owner of a sufficient quantity of water to irrigate the land claimed, sufficiently for agricultural purposes and has conveyed such water on the lands in such manner that he can use it for the purpose of irrigating his crop. The mere carrying of water on the land is not sufficient; it must be in sufficient quantities that a crop can be raised by the aid of the water so conveyed on the land. I do not think it is necessary to distribute the water over the land as is done in the course of irrigation. That would be to require a useless thing of the claimant, but the water must be conveyed to the highest portions of the land.

* * * * *

Your regulations should therefore be so amended as to allow other evidence of the reclamation of land besides that of a growing crop. The raising of an agricultural crop may be evidence of reclamation, but is not the only evidence that ought to be received and ought not at any time to dispense with actual proof as to the character of the ditch, quantity of water, etc., owned by the claimant.

In instructions of your office of July 23, 1885 (4 L. D., 51), it was said:

The raising of a crop without irrigation is not evidence of reclamation. But where land would not, without artificial irrigation, produce any agricultural crop, it must be reclaimed by conducting water upon it and upon every subdivision of it. There must be a proprietorship of sufficient water to continue the irrigation and make the reclamation perpetual. And the reclamation must be proven by evidence showing its manner and extent, and the results attained, as indicated in the forms of proof prescribed by official regulations.

I shall require evidence that the law has been complied with in form and spirit. I do not think the fact that crops *can* be raised is established until it is shown that crops *have* been raised, and it must also be shown that the raising of the crop is the result of a reclamation without which the crop could not have been raised.

The purpose of the desert land act is not to enable persons to acquire title to six hundred and forty acre tracts of public land by mere formalities and constructive compliance with law. The purpose is to secure the actual and permanent reclamation of land which in a natural state is unproductive.

The decision of date September 1, 1886, in the case of George Ramsey (5 L. D., 120), after referring to 3 L. D., 385, contains this statement:

But I will go one step further than my predecessor, and hold that the whole tract for which proof is offered (unless it be possibly some high points or uneven surfaces which are practically not susceptible of irrigation) must be *actually irrigated* in a manner indicative of the good faith of the claimant. In this connection the right to the water used, the quantity of it, the manner of its distribution, and the permanency of the supply are all to be taken into consideration.

In the case of Charles H. Schick (5 L. D., 151), September 14, 1886, it was held that proof of crops raised may be regarded as supplementing proof of irrigation, but should not be held as an essential requirement in final proof.

In the circular of June 27, 1887 (5 L. D., 708), it was stated that a person who makes a desert land entry before he has secured a water right does so at his own risk, and that the whole tract and each legal subdivision for which proof is offered must be actually irrigated.

In *ex parte* William G. Rudd (7 L. D., 167), August 8, 1888, it was held:

In his appeal he admits that he had not reclaimed the land nor conducted water thereon as required by law, but avers that as the proof shows that a large amount of work had been done with a view to reclamation of the land by conducting water thereon, and since the failure to conduct water upon said land within the time required by law was owing to no fault of his, but was caused by matters over which he had no control, therefore said proof should have been accepted as satisfactory and as evincing his good faith. The contention of appellant cannot be sustained. A showing of his intentions, however good they may have been, cannot avail in the absence of proof showing that what the law requires to be done in the matter of reclamation has been done.

It appears from the proof which was offered and which the local office and your office rejected, that ditches had been dug to conduct water upon the land but that no water had been so conducted.

In *ex parte* Adam Schindler (7 L. D., 253), August 22, 1888, although the proof showed that a large portion of the land had been cultivated to wheat, barley and vegetables, supplemental proof was required because the original proof failed to show what proportion of each legal subdivision had been irrigated.

The following is an extract from the decision in *ex parte* Emma J. Warren (8 L. D., 113), January 22, 1889:

Upon the other point appealed from, your decision is also affirmed in requiring additional proof, showing a satisfactory reclamation of the land by such means as will give reasonable promise of permanence. It must be qualified, however, so far as it insists upon an actual raising of crops as an absolute condition or evidence of reclamation. See George Ramsey (5 L. D., 120); Charles H. Schick (*ibidem*, 151). The raising of crop is not made by law a necessary fact; the reclamation may be established without it; yet, as the object of reclamation is to raise crops—among which I would include crops of grasses that would not otherwise grow upon the land—it is one evidence of reclamation usually to be expected as an accompanying fact. When, therefore, the proof fails to show that any crops have been produced upon the land, it ought to be required of the entryman to give satisfactory and trustworthy testimony of other facts which will satisfy the mind that the reclamation has in fact been made.

See also case of *Vibrans v. Langtree* (9 L. D., 419), of date September 26, 1889.

In the case of *Gilkison v. Coughanhour* (11 L. D., 246), September 5, 1890, a contest charging the non-desert character of the land was dismissed, but as the proof failed to show definitely what proportion of each legal subdivision had been irrigated, claimant was required to furnish supplementary proof, although "the water may have been

brought to the land in sufficient quantities to reclaim it. Possibly, but for the freezing weather . . . the water would have been running over and through each subdivision of the land; but the incident of the freezing weather and the consequent failure to irrigate the land, can not excuse claimant from showing its reclamation."

From the foregoing a fair conception may be had as to how the desert land act of 1877 was construed up to the passage of the act of March 3, 1891 (26 Stat., 1095). While it can not be said that such construction has been entirely uniform, yet force must be given the fact that an act was being construed which only requires reclamation of desert lands "by conducting water upon the same." The act of March 3, 1877, was amended by the act of March 3, 1891, *supra*, and the significance of this new legislation can very well be determined by reference to the limited provisions of the act of 1877 and the constructions placed thereon by the land department, as it must be presumed such provisions and constructions were fully in the mind of Congress when the act of 1891 was framed. The distinguishing features of said act necessary to be stated here are: Proof of the cultivation of one-eighth of the land is required; the quantity of land that may be entered is reduced to 320 acres; and the time within which the land is to be reclaimed is extended to four years. It is also provided in said act—

That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed.

Explanation is found in the foregoing for the fact that departmental decisions, to which reference is made in attorneys' briefs, have been rendered since the act of 1891, which follow the rules and decisions under the act of 1877, with no reference to the new legislation. But in those cases the entries were made prior to the amendatory act of 1891 and were therefore not necessarily controlled by the stricter provisions of said act. In this connection see *William Skeen* (14 L. D., 270); *John H. Kirk* (15 L. D., 535); *Meads v. Geiger* (16 L. D., 366); *Dickinson v. Auerbach* (18 L. D., 16); *Thompson v. Bartholet* (18 L. D., 96); *Rider v. Atwater* (20 L. D., 449); *Gage v. Atwater* (21 L. D., 211); and *United States v. McKinney* (27 L. D., 516).

The act of March 3, 1891, in addition to its other requirements also provided "that proof be further required of the cultivation of one-eighth of the land." Therefore, as to one-eighth of the land at least, the proviso clearly contemplates something more than, something distinct from, reclaiming said land "by conducting water upon

the same." During the course of the debates in Congress upon this legislation it was said:

Under this bill public lands that are susceptible of cultivation can not be acquired except in one of two ways: either under the homestead law by an actual settler, or under the modified desert-land law upon actual reclamation. There must be either actual reclamation or actual settlement by a homesteader upon the public land.

Water is the means of reclamation under the desert land law, and to secure actual reclamation even under the act of 1877, water must be conveyed in sufficient quantities upon each legal subdivision and so distributed as to thoroughly irrigate the land. But this is not the sole requirement under the act of 1891; in addition a specified portion of the land must be cultivated. There is nothing from which it can be inferred that the word "cultivation" was employed in the act in any different sense from what is ordinarily understood by that term, namely, tillage, which, as defined by Webster, is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." The evident purpose of the additional requirement of proof as to cultivation of one-eighth of the land was to show the sufficiency of the irrigation system. The primary object of the act of 1877 was the change of lands from a desert to an agricultural state, "to secure the actual and permanent reclamation of land which in a natural state is unproductive," and that title might not pass upon a mere constructive compliance with the law, the additional requirement of cultivation was put in the amendatory act of 1891. The definition of "reclaim" as given by Webster, is: "To reduce to a desired state by discipline, labor, cultivation, or the like; to rescue from being wild, desert, waste, submerged, or the like; as, to *reclaim* wild land, overflowed land, etc." The act of 1877 designates desert lands to be lands "which will not, without irrigation, produce some agricultural crop." In construing said act it is held by the Department that the term "crop" means such an agricultural production as would be a fair reward for the expense of producing it, and within that term may be included grass, wheat or barley, or "some other crop to which the country and climate in the region of the land are generally adapted." Therefore it would seem that the necessary corollary would be, even under the act of 1877, that reclamation of an arid, unproductive tract is not an accomplished fact until it is at least in condition to produce an agricultural crop, notwithstanding it has been held under said act of 1877 that "the fact of reclamation may be established without showing crops as the result of irrigation."

The desert land law has undoubtedly been construed along the same lines as other laws having reference to agricultural lands, as the primary object of said law is to change desert lands as such to an

agricultural state. Under exceptional circumstances acts performed in good faith which do not come strictly within the ordinary meaning of the term "cultivation" are sometimes accepted in lieu of the actual tillage of the soil. Thus, clearing the land of timber for the purpose of planting it, is cultivation within the meaning of section 2301 of the Revised Statutes. John E. Tyrl (3 L. D., 49). "There was some planting done for three years, and some little stirring of the ground every year since the date of entry. This is not sufficient of itself. He should have shown that this breaking and cultivating was done in a proper manner at the proper season of the year, and that the planting was also done in that manner." Taylor v. Huffman (5 L. D., 40). The cultivation contemplated by the homestead law is undoubtedly the preparation and use of the soil for agricultural purposes, whereby the land is reclaimed from its wild state and made productive. John T. Wooten (5 L. D., 389). Proof of the requisite improvements to secure pasturage and the production of grass, may be properly accepted in lieu of the usual proof of cultivation, where it appears that the land is better adapted to grazing purposes than to the cultivation of crops that require tillage of the soil. Mary A. Taylor (7 L. D., 200); Michael McKillip (7 L. D., 455). While cultivation ultimately includes the planting and raising of crops, there may be cultivation without this; one definition of the word being "improvement for agricultural purposes." George W. Johnson (7 L. D., 439). In this case claimant used the land principally for pasturage. This, with the value and permanent character of his buildings and the fact that he had broken between two and three acres, was considered sufficient cultivation. In the commutation of homestead entries breaking may be accepted as satisfactory proof of cultivation if good faith appears and the proof is satisfactory in other respects. T. H. Quigley (8 L. D., 551); Caroline Welo (8 L. D., 612); Thomas C. Burns (9 L. D., 432); Rosa B. Riggs (10 L. D., 526). In the case of timber-culture entries made prior to the regulations of June 27, 1887, the preparation of the land and planting of trees are acts of cultivation. Christian Isaak (9 L. D., 624). But no fixed rule can be laid down as to what shall constitute satisfactory cultivation under the timber-culture law. Costello v. Jansen (10 L. D., 10). Planting a crop with no expectation or intention of securing a return therefrom is not compliance with the homestead law in the matter of cultivation. Reas v. Ludlow (22 L. D., 205). Residence alone will not be held sufficient compliance with the law and is not considered by decisions of the department to be so. Settlement and cultivation are both required by section 2290 of the Revised Statutes, and cultivation is required by section 2291 of the Revised Statutes, as construed by decisions. Norton v. Ackley (29 L. D., 561).

In the case of John Cunningham (32 L. D., 207), referring to the case of George W. Johnson, *supra*, it was held, syllabus:

A showing on the part of a desert-land entryman that as a result of irrigation of the land there is a marked increase in the growth of the native grasses thereon, sufficient to support stock, is sufficient proof of cultivation.

The instructions of February 17, 1904 (32 L. D., 456), in which reference is made to the Cunningham decision, were issued for the reason, as stated therein, that possibly some expressions in said decision might "be taken as indicating a purpose to encourage the offer and sanction the acceptance of final proofs in desert land entries that do not clearly establish a strict compliance with all the requirements of law." These instructions do not, and were not designed to, as has been contended, enunciate any additional or more rigid rule than previously existed. On the contrary, they expressly state that they were prepared "for the purpose of laying down with greater exactness the proper rule to be observed in passing upon final proofs in desert land entries." Not a new rule, but the rule already in existence, the enforcement of which had in some cases become unduly lax. From what is hereinbefore set forth it can readily be seen that these instructions not only do not constitute a new rule but are fully justified by the amendatory act of 1891, which expressly imposes an additional requirement over the act of 1877 and at the same time gives an additional year in which to comply with said requirement. While the mere conducting of water to or upon the land so as to render it available for distribution when needed, may have satisfied the act of 1877, it plainly does not fulfill all the requirements of the act of 1891.

As to the material points in this controversy the evidence as a whole is entirely reconcilable. By a preponderance of said evidence it is shown that prior to final proof and contest only one lateral, that on the west, from the main Dewey canal, was constructed to this land. Whether the carrying capacity of said canal was sufficient, and the quantity of water therein at the time was sufficient, and whether contestee by reason of her alleged ownership of water stock entitled her to an adequate supply for her claim, or not, the fact remains that at time of proof water was not, and could not be in the nature of things, as shown by the evidence, distributed over the whole susceptible area of said claim so as to actually irrigate and reclaim it. The east lateral, which it is said was also for the purpose of conveying water to this land, was not constructed to said land at date of proof. It is admitted on behalf of contestee that only half of the claim could be watered from the west lateral. Only a small portion of the claim could have been irrigated from the Last Chance canal even though laterals had been taken out. The mere fact that this canal traversed this claim is not sufficient in itself to constitute reclamation of the territory traversed. *Nilson v. Anderson* (23 L. D., 138). There was

an area in the northeast of the claim in section 23, dependent upon the east lateral, which, as stated, was not completed until the spring of 1904, and not all of the land in section 22 could have been watered from the west lateral. But under the act of 1891 no amount of water stock nor available water can take the place of the work required to be done in the way of cultivation. It is doubtful whether the requisite number of acres had been plowed even. Other things being equal, the testimony of persons who actually measure a tract of land with a measuring instrument would ordinarily be accepted in preference to an estimate by those who merely view or *step* the premises. But whether the required acreage had been plowed or not is immaterial in this instance because the manner in which the plowing was done could in no sense be accepted as a compliance with law in the matter of cultivation, even if plowing might possibly in proper instance be accepted as cultivation. Desert land can not be said to be changed to an agricultural state—to a condition suitable for agricultural purposes—if there be left upon it, for instance, a growth of sage brush that not only seriously interferes with the plowing itself, but would render the harvesting of crops well-nigh impossible in the event they were planted.

Applying the instructions of February 17, 1904, the evidence here shows there was not even a marked increase in the growth of grass on one-eighth of the land, due to irrigation, and that grass sufficient to support stock had not been produced by reason of the irrigation system proper and probably not otherwise. It was shown that climatic conditions are not such as to prevent the raising of good and paying crops of both hay and grain and that tillage of the soil would not injure its productive qualities. While contestee may have an absolute right to sufficient water to irrigate the land, it conclusively appears that at time of proof the system of ditches was entirely inadequate to conduct water to and distribute it over the land. In fact, no ditches had at that time been taken out from the laterals. Certainly the turning of water once or twice into an inadequate lateral does not satisfactorily demonstrate the sufficiency of the water supply nor the effectiveness of the irrigation system. It is true the proof was prematurely made, in the sense that it was made prior to the expiration of the statutory period, that at time of hearing the irrigation system was in working condition; and that a large number of acres were broken, cleared and in cultivation. These considerations might possibly be given weight were the case one between the entryman and the government, but as contestee saw fit to submit proof at the time she did, and in the presence of a successful contestant whose rights in the premises can not justly be ignored, they can not avail.

The decision of your office herein is reversed, and the entry in question will be canceled.

HOMESTEAD ENTRY—QUALIFICATIONS—KINKAID ACT.

ARTHUR J. ABBOTT.

The act of April 28, 1904, known as the "Kinkaid Act," does not repeal any of the provisions of the homestead laws, but merely amends said laws by allowing entry of a greater number of acres, within the limits designated, than is permitted thereunder, and one disqualified to make entry under the general homestead laws, by reason of being the owner of more than one hundred and sixty acres of land, is therefore likewise disqualified to make entry under said act.

The qualifications of an applicant to make additional entry under the act of April 28, 1904, must be determined as of the date of the presentation of the application and not as of the date when his original entry was made.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 23, 1906.* (C. J. G.)

An appeal has been filed by Arthur J. Abbott from the decision of your office of November 18, 1905, approving the action of the local officers in rejecting his homestead application under the act of April 28, 1904 (33 Stat., 547), for the W. $\frac{1}{2}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, lots 1 and 4, Sec. 11, T. 24 N., R. 38 W., containing 478.16 acres, Broken Bow, Nebraska.

In said application, which was filed November 21, 1904, Abbott stated that he made homestead entry for a quarter section of land at Oberlin, Kansas, upon which proof was made in 1889 after five years' residence. In an affidavit accompanying said application, he stated that he "at this time is the owner of more than one hundred and sixty acres of land the title to which is vested in affiant by purchase. That the land so owned by affiant is located in the townships and ranges in or near which the lands herein applied for are located. That said lands are used for pasture and grazing purposes and are of no value for agricultural purposes. That the lands herein applied for are valuable only for grazing and pasture and that affiant desires to enter the same for that purpose and no other." The rejection of Abbott's application to enter the land in question is on the ground that he is disqualified by reason of the ownership of more than 160 acres of land. It is urged, however, that he is qualified to enter said land regardless of the fact that he has acquired other lands by purchase since his original homestead entry.

The act of April 28, 1904, *supra*, entitled "An act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska," provides in part:

That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit . . . shall not exceed in area six hundred and forty acres. . . .

SEC. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the land heretofore entered by them, may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned and occupied, exceed in the aggregate six hundred and forty acres; and residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered, but final entry shall not be allowed of such additional land, until five years after entering the same.

SEC. 3. . . . That the commutation provisions of the homestead law shall not apply to entries under this act, and at time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than one dollar and twenty-five cents per acre for each acre included in his entry: *Provided*, That a former homestead shall not be a bar to the entry under the provisions of this act of a tract which together with the former entry, shall not exceed six hundred and forty acres.

It is under this last provision (first proviso) that the application here in question is made. The circular of instructions under said act, dated May 31, 1904 (32 L. D., 670), as amended by circular of August 21, 1905 (34 L. D., 87), provides:

By the first proviso of section 3, any person who made a homestead entry prior to his application for entry under this act, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries.

The circular also provides:

Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

It was evidently not the intention of Congress by this act of April 28, 1904, to repeal any of the provisions of the homestead laws, but merely to amend said laws, as shown by the title of said act, and only in the manner specifically indicated therein, namely, to allow a greater number of acres over what could ordinarily be entered under said laws, owing to the character of the lands, and upon final proof to require a showing of a certain expenditure per acre, also due to the character of said lands which are not susceptible of cultivation but fit only for grazing purposes. Beyond this the existing laws are to remain in full force and they prohibit homestead entry to one who is owner of more than 160 acres. This is clearly indicated by the language of the act and the purpose for which it was passed, as well as by the circular instructions thereunder. In this case the former homestead entry of Abbott was no bar under said act to his making additional entry of enough of these lands to equal 640 acres, provided he was otherwise qualified under the homestead laws. Not being so

qualified by reason of his ownership of more than 160 acres, his application was properly rejected. The disqualification so resulting is operative regardless of the manner in which title to the other land was obtained, and there can be no exception on account of the ownership being of lands fit only for grazing purposes. Then too, also following the general rule, Abbott's qualification to enter these lands must be determined at date of his present application and not as of the date when his former entry was made.

The foregoing is on the assumption that Abbott, in saying he desired to enter these lands only for grazing purposes, did not also mean to say that it was not his intention to reside on said lands; but that although making his home thereon he expected to use the lands only for grazing purposes.

The decision of your office herein is affirmed.

RAILROAD GRANT—RIGHT OF WAY—SECTION 13, ACT OF FEBRUARY 28, 1902.

MISSOURI, KANSAS AND TEXAS RY. CO.

The right of way granted by section 13 of the act of February 28, 1902, is a mere easement, for "depot grounds, terminals, and other railway purposes," and the grantee has no authority to extract oil from the grounds embraced in a right of way acquired under said act.

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 23, 1906. (G. B. G.)

By reference of the 3d instant I am requested "to consider and report as to the proper course to be pursued" in the matter of the alleged extraction of mineral oils by one J. B. Showalter, of Butler, Pennsylvania, from the right of way of the Missouri, Kansas and Texas Railway Company, near the town of Cleveland, Oklahoma.

It seems that Mr. Showalter is operating under a lease from said company several oil-bearing wells upon a portion of the right of way near said town, acquired by said company under section 13 of the act of February 28, 1902 (32 Stat., 43).

In my opinion of March 14, 1905 (33 L. D., 470), I advised you that the grant of the right of way to said company, found in the act of July 26, 1866 (14 Stat., 289), is similar to the grant of right of way made to the Northern Pacific Railroad Company by the act of July 2, 1864, and; upon authority of the case of the Northern Pacific Railway Company v. Townsend (190 U. S., 267, 271), said that the Missouri, Kansas and Texas Railway Company is not authorized to use or permit the use of its right of way for a purpose not contemplated

by the granting act, and that although said company took a base fee under its grant of right of way, yet it did not acquire the right to take mineral oils therefrom.

The opinion referred to would be conclusive of the question here presented except for the fact, above stated, that the matters involved in this reference relate to a portion of the company's right of way acquired under the act of February 28, 1902, instead of under the act of July 26, 1866.

Section 13 of the act of February 28, 1902, is as follows:

That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this act.

I do not think there can be any doubt that a right of way acquired under this statute is a mere easement—a title of even less dignity than that given by the granting act of 1866—and therefore with better reason it follows that the company is not authorized to use it except for “depot grounds, terminals, and other railway purposes.”

The mineral oils underneath this right of way are part of the realty, do not appear to be needed for any railway purpose, and are clearly not within the privilege granted by the act of February 28, 1902. The appropriation thereof is a manifest invasion of rights belonging to the owner of the fee. I advise you that such owner, whether it be an individual Indian, or an Indian tribe or nation, is entitled to the protection of the United States government, and that the matter should be referred to the Department of Justice for the institution of such proceedings in that behalf as it is thought may be successfully maintained.

Approved:

THOS. RYAN, *Acting Secretary.*

BURTIS v. STATE OF KANSAS ET AL.

Motion for review of departmental decision of December 16, 1905, 34 L. D., 304, denied by Acting Secretary Ryan, March 23, 1906.

PRIVATE LAND CLAIM—CONFIRMATION OF TITLE—ACT OF MARCH 3,
1891.ELY'S ADMINISTRATOR *v.* MAGEE ET AL. (RANCHO DE SAN JOSE DE
SONOITA.)

There is no provision in the act of March 3, 1891, requiring one claiming a complete and perfect title through the Spanish or Mexican government to lands situated within the territory embraced in the Gadsden Purchase, who does not come into court voluntarily for the purpose of having his title confirmed under section 8 of said act, but is brought into court by the United States without his consent, to except from his claim, and, as a condition to the confirmation of his title, to recognize the title of the United States to, such portions of the lands claimed by him as may have been sold or disposed of by the United States.

The United States may, under the provisions of said act, bring the grant claimant into court without his consent, for the purpose of determining whether he has any title to the lands claimed, and, if so, the extent of such title, but not for the purpose of confirming the title to portions of said lands sold or disposed of by the United States.

The Commissioner of the General Land Office is without authority or discretion to adjudge and determine whether the survey of a private land grant conforms to the decree of the court confirming the grant, but has simply to perform the ministerial duty of issuing patent for the land according to the lines of the survey as approved by the court and in accordance with the terms of the decree.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 26, 1906.* (E. F. B.)

This case comes before the Department upon the appeal of Santiago Ainsa, administrator of the estate of Frank Ely, from the decision of your office of November 9, 1904, requiring him to show cause why all the lands within the limits of the private land claim known as the Rancho de San Jose de Sonoita that were disposed of and patented by the United States prior to the decree of confirmation by the Court of Private Land Claims "should not be specifically excepted from the patent proposed to be issued in favor of said grant."

Appellant insists that the confirmation of said claim was for the entire tract embraced in the survey, free from all claim of the patentees under the United States; and, further, that the Commissioner of the General Land Office has no office to perform except the simple and purely ministerial duty of issuing a patent in conformity with the approved survey made in pursuance of the decree.

The private land claim known as the Rancho de San Jose de Sonoita is in that part of the Territory of Arizona acquired by the United States under the Gadsden purchase and is one of the claims recognized and protected by the stipulations in Articles 8 and 9 of the treaty of Guadalupe Hidalgo, which were reaffirmed in Article 5 of the Gadsden Treaty.

Provision was made for the adjustment of these claims by the act of July 22, 1854 (10 Stat., 308), which made it the duty of the Surveyor-General of New Mexico (which then included what is now the Territory of Arizona) to ascertain, under instructions from the Secretary of the Interior, the origin, nature, character and extent of all claims to lands under laws, usages and customs of Spain and Mexico originating before the cession of the territory to the United States, and the same powers and duties were conferred upon the Surveyor-General of Arizona by the act of July 15, 1870 (16 Stat., 304).

A petition for the confirmation of this grant under said acts was filed with the Surveyor-General, but it had never been acted upon by Congress and the claim had never been surveyed by authority of the United States until the survey made in accordance with the decree of the Court of Private Land Claims. Prior to that decree the United States had extended the public-land surveys over a portion of the claim, as defined by the survey made in conformity with said decree, and had disposed of and patented a number of claims within said limits to pre-emption settlers as public lands of the United States.

Such was the status of the claim and of the lands in controversy at the date of the passage of the act of March 3, 1891 (26 Stat., 854), establishing a Court of Private Land Claims for the adjustment and confirmation of claims under grants from the Mexican government to lands in Arizona and the other States and Territories named therein. That act repealed section 8 of the act of July 22, 1854, and all acts or parts of acts inconsistent with its provisions.

Under a provision of section 8 of said act of March 3, 1891, the United States filed a petition in the Court of Private Land Claims against Ainsa, as administrator of Ely and others, alleging that said administrator claimed to be the owner through mesne conveyances of a tract of land known as the Rancho de San Jose de Sonoita under a complete and perfect title, emanating from the Mexican government prior to the date when the United States acquired sovereignty over said territory; that said claimant had not voluntarily come into court seeking a confirmation of his title under the provisions of said section 8; that his title was open to question, was invalid and void, and the land had never been segregated and located. It was also alleged that the United States had, many years prior to the filing of said petition, surveyed a portion of the land so claimed and had disposed of and patented the same to the other defendants named in the petition, as public lands of the United States. The prayer of the petition was that all of said defendants should be required to answer, and that defendant Ainsa be required to produce his title papers, for adjudication, and if it be adjudged to be valid,

that the extent and boundaries of the claim may be settled and determined "excepting any part of such lands that should be found to have been disposed of by the United States."

The answer of the administrator admitted that he was holding under a complete and perfect title and had not voluntarily come into court for a consideration of such title. It denied every allegation as to the invalidity of the title and that it had not been located, and averred that if any patents had been issued by the United States for any of said lands, they were wholly invalid and void. No answer was filed by the defendants holding the patents of the United States.

In an amended answer he set out his title and averred that the possession of the defendants holding under patents from the United States was entirely without his permission and that said patents conveyed no title whatever, as the complete and perfect title in fee was in the owner of the grant at the time of the Gadsden purchase and the United States never had any title to the same.

The United States denied all matters and things set up in the answer except so far as they were admissions of the allegations in the petition and upon the issue thus made the court decided that "the entire proceedings set forth in the expediente of this title and the final title issued thereon were without warrant of law and invalid."

Upon appeal the Supreme Court held that this grant was one which, at the time of the cession in 1853, was recognized by the government of Mexico as valid, and therefore one which it was the duty of the government to respect and enforce. *Ely's Adm'r v. United States* (171 U. S., 220, 234).

The judgment of the Court of Private Land Claims was reversed and the case was remanded with directions to the court "to examine and decide whether there be sufficient facts to enable it to determine the true boundaries of the one and three-fourths sitios," the extent of the grant as found by the Supreme Court.

The final decree made in obedience to the mandate of the Supreme Court adjudged that the title to said claim was perfect and complete at the date the United States acquired sovereignty over the territory and was such a valid title as the United States are bound upon principles of the public law and by the provisions of the treaty of cession to respect as a valid, complete and perfect title at said date. It therefore decreed that the title be confirmed in said grantee, his heirs, successors in interest and assigns, to the extent defined by the boundaries therein described," subject to such of the limitations and terms of the act of Congress approved March 3, 1891, as are applicable hereto." From this there was no appeal.

A survey of the grant was made accordingly and was returned to the court for its approval in compliance with the statute when a

petition was presented by the defendants who claimed under patents from the United States as public lands, asking that the lands so patented and claimed be expressly excepted from the decree or order approving the survey. The court overruled and dismissed the petition, found that the survey conformed with the decree, and directed that it be approved and returned to the Commissioner of the General Land Office. No appeal was taken from this ruling.

As to the effect and scope of the decree, an important and decisive question is whether the act of March 3, 1891, imposes as a condition to the confirmation of every Mexican grant, the recognition of the title of the United States to such portions of the grant as it may have disposed of as public lands, irrespective of the manner in which the claim came before the court; in other words, whether the condition that attaches to confirmation by force of the statute, in cases where the claimant invokes the aid of the court to confirm his title, applies with equal force and effect in cases where he does not voluntarily come into court, but is brought in by the United States to have his title settled and adjudicated.

Another material and controlling question is whether the duty of the Commissioner in issuing the patent is not purely ministerial, without any authority or discretion to adjudge and determine, and, if this should be answered affirmatively, it may at least be questioned whether the claimant has selected the proper forum to enforce his right.

The 6th section of the act provides for the confirmation of such incomplete and equitable claims to lands as the United States were bound to recognize and confirm by the treaties of cession. Under those treaties the United States were invested with the full legal title, burdened only with the treaty obligation that such claimants shall be allowed to perfect their titles to the same extent that they would have been allowed if the land had remained under the jurisdiction and sovereignty of the foreign government. As the legal title to the lands so claimed would not be perfected until confirmation, the United States could convey, at any time prior to such confirmation, a valid title to the lands, notwithstanding the treaty obligations, and could therefore add any condition to such confirmation that the political department of the government chose to impose. One of the conditions prescribed by the 13th section of the act is that it shall be obligatory upon such claimants to seek confirmation of the claims within the time limited by the act or to be forever barred from asserting any claim to such lands.

Section 8 of the act, under which the petition in this case was filed, provides for the confirmation and adjustment of claims to lands where the legal title was acquired by the claimant from the foreign

government prior to the treaty of cession and where the United States never acquired or held any title to such lands. As every part of that section has a material bearing upon the question at issue, it will be given in full.

Sec. 8. That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby.

It shall be lawful for and the duty of the head of the Department of Justice, whenever in his opinion the public interest or the rights of any claimant shall require it, to cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the States or Territories mentioned in this act who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court, are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on such notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try, and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice, and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto.

It is a proposition too well settled to be controverted that the United States never acquired by treaty of cession the title to any land which at the date of the cession was not in the foreign government. "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him: lands which he had previously granted were not his to cede." *United States v. Percheman*, 7 Peters, 51, 87.

The case cited involved the validity of a grant in the territory acquired by the Florida cession of February 22, 1819. Perfect and

complete titles to lands in that territory made by Spain prior to January 24, 1818, were confirmed by the treaty. They needed no confirmation by Congress but could be asserted in the courts upon the documents under which they were issued. See also *United States v. Wiggins*, 14 Pet., 334; *United States v. Arredondo*, 6 Pet., 691.

The principle, however, applies with equal force as to lands acquired under every treaty, for the reason that private rights of property within the ceded territory are not affected by the change of jurisdiction and sovereignty and are protected by the usages and laws of nations independently of the treaty stipulations. *Ainsa v. United States*, 161 U. S., 208, 220; *Ainsa v. New Mexico and Arizona R. R. Co.*, 175 U. S., 76.

But the duty of securing such rights, and of fulfilling treaty obligations imposed upon the United States by the treaty, belongs to the political department of the government. It may prescribe the forms and manner of proceeding in order to obtain confirmation, and may establish tribunals to investigate and pronounce upon their fairness and validity. *De la Croix v. Chamberlain*, 12 Wheaton, 599, 601. "Even grants which were complete at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held to be valid." *Ainsa v. Railroad Company*, 175 U. S., 76, 79. And, although the treaty provisions may be violated, the courts will follow the statutory enactments of its own government, as they have no power to enforce the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *Botiller v. Dominguez*, 130 U. S., 238, 247. *Florida v. Furman*, 180 U. S., 402. "But where no such proceedings are expressly required by Congress, the recognition of grants of this class in the treaty itself is sufficient to give them full effect." *Ainsa v. Railroad Company*, 175 U. S., 76, 80.

The opinion of the court in the case last cited is an elaborate review of the decisions of that court upon the different treaties under which foreign territory has been acquired by the United States, and of the legislation by Congress securing rights and fulfilling obligations under such treaties, showing in what respect the recognition of the validity of a grant is affected by such legislation.

As shown by the court in that opinion, the effect of the repeal of the act of July 22, 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act" (March 3, 1891), was to give full effect to complete and perfect grants of lands in the States or Territories mentioned in said act by reason of the recognition given to the grant in the treaty itself and to leave them free to be asserted

in the ordinary courts of justice upon their title papers in the same manner as grants to lands in Florida and Louisiana could be asserted.

Speaking of the effect of said repeal the court said:

The result is that the United States, by the act of 1891, have prescribed and defined the only method by which grants incomplete before the cession can be completed and made binding upon the United States; but have neither made it obligatory upon the owner of a title complete and perfect before the cession to resort to this method, nor declared that his title shall not be valid if he does not do so.

A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California; and may be asserted, as against any adverse private claimant, in the ordinary courts of justice. (Page 90.)

From the well-established principles so lucidly stated and applied in that case we are led to the inquiry whether there is any provision in the act of March 3, 1891, that requires the owner of a complete and perfect title to recognize, without his consent, the title of the United States to any part of his lands, as a condition to the recognition by the United States of the validity of his title to the full extent acquired by him from the foreign government.

There is no doubt that while the act was in force the United States could have invoked the aid of the court to have the validity of any Mexican grant in said States and Territories adjudicated and determined, and a decision of the court upon such proceedings adverse to the claimant would be final unless reversed by the supreme court, and no court could thereafter recognize such title for any purpose.

In short, the United States, at their election, may have the validity of any Mexican grant, whether complete or incomplete, determined by the Court of Private Land Claims, so far as concerns the interest of the United States; and proceedings to establish against the United States private titles claimed under incomplete Mexican grants are within the exclusive jurisdiction of that court; but the private holder of any complete and perfect Mexican grant may, but is not obliged to, have its validity as against the United States determined by that court; and no rights of private persons, as between themselves, can be determined by proceedings under this act. (Page 89.)

The purpose of the act is very plain and the scope and effect of the decree in a case where confirmation by the court is voluntarily sought, is easily distinguished from a case where the claimant is involuntarily brought before the court, in order that the United States may have it determined by the court whether he has any title or not.

A decree of confirmation being final and conclusive as to the validity of the title, so far as the interest of the United States is concerned, would avoid the necessity thereafter of having to assert and defend such title upon the documents under which it was issued and it was therefore a valuable right. The act did not require a claimant who

had a complete title to go before the court to test its validity, but permitted him to do so upon the condition that "such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States," and by the 14th section of the act it was provided—

That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands, and such judgment, when found, shall be a charge on the Treasury of the United States.

In such cases lands lying within the limits of the grant that had been disposed of by the United States were expressly excepted from confirmation by force of the statute and were confirmed to the patentees not by virtue of any title possessed by the United States but solely by consent of the grant claimants. Having invoked the aid of the court for confirmation, they were bound by all the conditions of the act, and having accepted its benefits they also accepted the conditions imposed. *Juan de la Cruz Trujillo*, 28 L. D., 544.

How then can the title to such lands as the United States may have sold be confirmed in any case where the claimant did not voluntarily come into court, if he was not bound to invoke the aid of the court to test the validity of his title. It may be urged that the United States had the right to bring him before the court without his consent, but that was to determine whether he had *any* title as against the United States, and if so, what was the *extent* of the title he acquired. It was not intended as a means of enforcing an arbitrary right to confiscate the claim or any portion thereof against the consent of the claimant.

If the United States never acquired any title to this land by the treaty of cession and the absolute fee at that time was in the grant claimant as determined by the court, and if after the passage of the act of March 3, 1891, it was not obligatory upon such claimant to go before the tribunal created by that act to have his title recognized and its validity determined, and such title could be asserted before the ordinary courts of justice, it is utterly inconsistent to hold that such rights could be invaded or impaired by being brought into court involuntarily upon the petition of the United States.

Besides a statute prescribing a mode by which a party may be divested of his property for the benefit of another without his consent is in derogation of common right and must be strictly construed.

Nothing can be taken by intendment, it must clearly appear from the statute.

It was however contended in this case that the claimant voluntarily consented to the conditions imposed by the statute when he filed his amended answer to the petition "praying that the validity of his title may be inquired into and decided, and that his title to said lands be declared valid." It is insisted that this was in effect an original bill under the provisions of the act, and having sought the confirmation of his grant, he could only do so upon the terms prescribed in the act.

There is no substantial ground upon which this contention can be sustained. The prayer of the government's petition was strictly in conformity with the express direction contained in the act, "that the title to said lands be settled and adjudicated, and if the title be adjudged to be valid, that the extent and boundaries thereof be then settled and adjudicated." Whether the amended answer had or had not been filed, the decree would have been the same, for the reason that the very object of the proceedings filed on behalf of the government was to test the validity of the title, and if adjudged to be valid, that the boundaries be determined. There was nothing in the amended answer either in the nature of an original bill or of a cross-bill or that converted the proceeding into a suit in behalf of claimant, or that sought to enlarge or extend the decree in his favor beyond what would have been decreed under the prayer of the petition without the amended answer.

Nor was there anything in the answer from which the slightest inference could be drawn that he consented to such proceedings or recognized the title of the United States or the legality of the possession of the defendants claiming under it. On the contrary, the titles of the United States were denounced as wholly null and void; that the possession of the defendants holding under such titles was unlawful and without permission of claimant and that he (claimant) was entitled to confirmation of the *whole* grant in accordance with the metes and bounds set forth in the original survey and grant. The answer set up no new matter, nor required a response from the United States, but on the contrary it was strictly responsive to the prayer of the petition.

But if it be conceded that lands within the limits of the survey, which had been disposed of by the United States prior to the decree of confirmation, were excepted from such decree, it does not appear that any jurisdiction or authority was conferred upon the Commissioner of the General Land Office to adjudicate and determine what lands should be patented and what should be excepted and specifically excluded from the patent.

The act of March 3, 1891, repealed all prior acts of Congress and laws providing for the investigation and adjudication of claims and titles to lands in said States and Territories protected by said treaties, and conferred upon the Court of Private Land Claims exclusive jurisdiction in such matters. Whatever jurisdiction or power the Commissioner of the General Land Office has therein is expressly conferred by the act and he cannot assume or exercise any authority in such matters by virtue of the general authority conferred upon him in disposing of the public lands, but must look strictly to the act for the source of his authority.

His duties in this behalf are defined in the tenth section of the act. After the final decree of the court, it is made the duty of the clerk of said court to "certify that fact to the Commissioner of the General Land Office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries and area of the tract confirmed." The Commissioner "shall thereupon without delay cause the tract so confirmed to be surveyed at the cost of the United States."

It is provided that after the survey shall have been made, notice shall be given thereof, and it shall remain in the office of the Surveyor-General for ninety days. If, at the expiration of such period, no objections are filed, the Surveyor-General "shall approve the same and forward it to the Commissioner of the General Land Office." If objections are filed "by any party claiming an interest in its confirmation, or by any party claiming an interest in the tract embraced in the survey or any portion thereof," the Surveyor-General shall, at the expiration of the ninety days, "forward such survey, with the objections and proofs filed in support of or in opposition to such objections, and his report thereon, to the Commissioner of the General Land Office."

Immediately upon receipt of any such survey, with or without objections thereto, the said Commissioner shall transmit the same, with all accompanying papers, to the court in which the final decision was made for its examination of the survey and of any objections and proofs that may have been filed, or shall be furnished; and the said court shall thereupon determine if the said survey is in substantial accordance with the decree of confirmation. If found to be correct, the court shall direct its clerk to indorse upon the face of the plat its approval. If found to be incorrect, the court shall return the same for correction in such particulars as it shall direct. When any survey is finally approved by the court, it shall be returned to the Commissioner of the General Land Office, who shall as soon as may be cause a patent to be issued thereon to the conferee.

The specific duty of the Commissioner is so clearly defined and limited by the act as to impliedly prohibit the exercise of any discretion or authority to adjudicate and determine. Even in the matter

of the field work of the survey, it is the approval of the Surveyor-General that is required, whose report is to be forwarded, but none from the Commissioner is required. See *Maese v. Hermann*, 183 U. S., 572.

Furthermore, the very question that your office assumed to determine had already been determined by the court. If the court had the power to determine whether the survey was in conformity with its decree and that the patent should issue according to the boundaries defined by said survey, notwithstanding the objection to its approval, without first eliminating the lands claimed under the patents of the United States, how can the Commissioner pass upon that question without infringing upon the prerogatives and jurisdiction of the court?

If the lands within the surveyed limits of the grant which have been patented to the United States are excepted from the operation of the decree of confirmation, as claimed, it is by force of the statute itself and not by virtue of any authority in the Commissioner of the General Land Office to determine, nor upon any adjudication of the Court of Private Land Claims. If such is the case, the patent of the United States antedating the decree would be the source of title confirmed by force of the statute, and could be asserted in the ordinary courts of justice as fully as if the land covered thereby had been expressly excluded from the patent to the claimants of the grant.

The issuance of the patent according to the boundaries defined by the survey without excluding any lands therefrom will no more determine or affect the rights of these patentees than would the issuance of a patent for a townsite of lands known to be mineral at that date affect or determine the rights of mineral claimants. In both cases the operation of the patent is limited and restricted by the statute.

If there is no power to adjudge, or discretion to exercise, the duty would seem to be purely ministerial and your refusal to act would be a personal matter, not strictly subject to be controlled and reviewed by the supervisory authority.

When a mere ministerial duty is imposed upon an executive officer, which duty he is obliged to perform without any further question, a writ of mandamus will lie to compel him to perform his duty. *Roberts v. United States*, 176 U. S., 221, 230.

In this view it may be questioned whether this is such an appeal as the Department should entertain. It may however always advise and where the good order and conduct of the business of the Department is involved, it should exercise this privilege.

Entertaining the views herein expressed, the Department is of the opinion that your duties under the act of March 3, 1891, require the issuance of this patent in accordance with the decree of the court;

leaving the question as to the rights of the parties to be determined by the courts.

As this survey was approved by the Commissioner prior to June 30, 1904, no reference has been made in this decision to the provision of the act of April 28, 1904 (33 Stat., 452, 485)—

That all the powers now exercised by the Court of Private Land Claims in the approval of surveys executed under its decrees of confirmation shall be conferred upon and exercised by the Commissioner of the General Land Office from and after the thirtieth day of June, nineteen hundred and four.

MOBILE AND GIRARD GRANT—HOMESTEAD ENTRY—ACT OF FEBRUARY 24, 1905.

JAMES A. BRYARS.

The act of February 24, 1905, relating to lands within the Mobile and Girard railroad grant, according to a homestead entryman coming within its provisions the privilege to transfer his claim to other lands, does not contemplate that an entryman who has completed his entry under the commutation provisions of the homestead law and received final certificate thereon shall, in the exercise of the privilege accorded by said act, make a second homestead entry and submit proof thereon, after due notice, as required in making an original homestead entry, nor that the lands applied for shall be a compact body of contiguous land, but where not contiguous all the land must be within the same land district, and where the aggregate of the legal subdivisions applied for exceeds the acreage embraced in the original entry, the entryman will be required to pay for such excess.

An application to exercise the privilege of transfer accorded by the act of February 24, 1905, is not required to be made by the entryman in person; nor is he required to furnish an affidavit under the act of August 30, 1890, to the effect that he has not since that date made entry of or acquired title to a quantity of land under the agricultural land laws, which, with the land now applied for, will exceed three hundred and twenty acres.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 26, 1906.* (F. W. C.)

The Department has considered the appeal by James A. Bryars from your office decision of February 16, last, affirming the action of the local officers at Miles City, Montana, in rejecting his application filed by James Deering, as attorney-in-fact, to transfer, under the provisions of the act of February 24, 1905 (33 Stat., 813), his homestead claim upon the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 1 S., R. 4 E., St. Stephens Meridian, Alabama, covering 134.84 acres, to lot 1 and the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10, lot 3, Sec. 11, and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 9, T. 27 N., R. 56 E., Montana Meridian, Montana.

Said application was on November 28, 1905, presented at the local land office at Miles City, Montana, by James Deering, as attorney-in-

fact for James A. Bryars, and was rejected by the local officers for the following reasons:

(1) That the application is not offered and a new entry sought to be made by the original entryman in person.

(2) That the application is made for a non-contiguous tract made up of four separate subdivisions in three different sections, and is therefore not in compliance with the provisions of the homestead law.

(3) That the application is for an excess of 14.82 acres over the entry relinquished, and that no tender of payment for such excess acreage has been made by the applicant.

(4) That the applicant has not furnished with his application an affidavit that he has not since August 30th, 1900 (1890), filed upon or acquired title to, under the agricultural land laws of the United States, such a quantity of land which would, with the entry now applied for, amount to more than 320 acres.

From such rejection appeal was taken to your office, the same being considered in your office decision of February 16, last, appealed from. In said decision your office held that the fact that Bryars proffered his entry by an attorney instead of appearing in person was not a sufficient reason for rejecting the application, neither was it necessary for the applicant to furnish an affidavit under the act of August 30, 1890 (26 Stat., 391), to the effect that the entryman has not since that date made entry of or acquired title to a quantity of land under the agricultural land laws, which, with the land now applied for, will exceed 320 acres, for the reason that such an affidavit was made by Bryars at the time of making his entry of land in Alabama, which was sought to be transferred to the land here in question.

The rejection of the application was, however, sustained upon the ground that no two of the tracts applied for are contiguous, lot 1 of Sec. 10, and lot 3 of Sec. 11, cornering the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10, being one-half mile distant from that lot, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 9, being a mile or more distant from the other lands included in the application, and, consequently, did not constitute a compact body of land subject to entry under the homestead laws. Also, that as the aggregate area included in the present application, as shown by the official plat of survey, is 149.66 acres, being an excess over the former entry of 14.82 acres, it should be paid for.

The theory of the decision appealed from is that the right according the transfer of a homestead claim under the act of February 24, 1905, *supra*, is but the equivalent of the right to make a second homestead entry, and that as a consequence the applicant should be required to make a formal application under the homestead laws and publish notice of his intention to submit proof thereunder, being entitled when making such proof to credit upon the second entry for such compliance with law as was made under the first entry.

So much of the act of February 24, 1905, as is material to the questions raised by the appeal now considered is as follows:

That where any homestead entry heretofore allowed under ruling of the Land Department, for lands within the limits of the grant made by act of Congress approved June third, eighteen hundred and fifty-six (Eleventh Statutes, page eighteen), to the State of Alabama in aid of the construction of the railroad known as the Mobile and Girard Railroad has been canceled because of a superior claim to the land through purchase from the railroad company, which claim has been held to have been confirmed and a confirmatory patent issued for the land under the provisions of section four of the act of March third, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page five hundred and fifty-six), such homesteader is hereby accorded the privilege of transferring his claim thus initiated under the homestead laws to any other non-mineral unappropriated public land subject to homestead entry, with full credit for the period of residence and for the improvements made upon his homestead hereinbefore first described prior to the order of its cancellation, provided he has not forfeited or voluntarily abandoned his homestead claim and that his application for transfer is presented within one year from the date of the passage of this act.

The facts with regard to Bryars's original homestead entry made for lands in the State of Alabama, as gathered from your office decision, are as follows: September 13, 1897, James A. Bryars made homestead entry, No. 31686, at the Montgomery, Alabama, land office, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 1 S., R. 4 E., St. Stephens Meridian, Alabama, containing, according to the approved plat of survey of said township, 134.84 acres, which entry he commuted to cash, after the submission of commutation proof and payment, on June 19, 1899. By your office decision of December 2, 1899, said entry was canceled for conflict with the claim of Louisa A. Carney, administratrix of the estate of James A. Carney, deceased, under the provisions of section 4 of the act of March 3, 1887 (24 Stat., 556), and thereafter Mrs. Carney was permitted to make entry of the land under the act of 1887, upon which the patent of the United States issued for said land February 2, 1900.

Following the passage of the act of February 24, 1905, to wit, August 27, 1905, Bryars filed in your office his election to transfer his claim under the provisions of said act, at the same time relinquishing all right, title and interest in and to the tracts embraced in his former homestead entry. This relinquishment was accepted by your office and thereupon Bryars became entitled to transfer his claim initiated to the land in the State of Alabama, under the homestead laws, "to any other nonmineral, unappropriated public land subject to homestead entry, with full credit for the period of residence and for the improvements made upon his homestead."

Where the homestead made for land in the State of Alabama had been completed by the offer of satisfactory proof of compliance with

the homestead laws, upon which final certificate for patent had been issued, there was, in the opinion of this Department, no necessity in transferring such claim under the provisions of the act of February 24, 1905, to make a second homestead entry upon which proof was to be submitted after due publication of notice, the law having been fully satisfied by the compliance shown and the proof submitted upon the tract in Alabama. The right to transfer was a completed right and this being so there can be no good reason for restricting the applicant to a compact body of contiguous land such as he would be required to enter in making an original homestead entry. In the making of soldiers' additional homestead entry under the provisions of section 2306 of the Revised Statutes, it is not required that the tracts entered be contiguous or compact in form. See case of Edgar Boice (29 L. D., 599). Again, in the exchange of lands provided for in the act of June 4, 1897 (30 Stat., 11, 36), where the title to the land relinquished has passed out of the United States, or where certificate for patent thereto has issued, the selection is permitted to embrace contiguous or noncontiguous tracts if in the same land district. See Emil S. Wangenheim (28 L. D., 291).

The Department is of opinion, as there is nothing in the statute specifically limiting the transfer authorized under the act of February 24, 1905, to contiguous lands in compact form, in view of the liberal construction heretofore placed upon statutes of a somewhat similar nature so far as applied to the transfer of completed claims, that no good reason exists for restricting or limiting the right of transfer authorized under this act, so far as applies to the transfer of completed claims, to contiguous lands compact in form. The rule established under the act of 1897, above referred to, limiting the selection to lands in the same land district, should, however, be applied, and the transfer limited to one entry. In so far therefore as your office rejected the application under consideration because of the fact that the lands applied for were non-contiguous and not compact in form, the same is reversed.

It will be remembered from the foregoing recitation, that Bryars commuted the entry made for lands in the Montgomery land district, Alabama, and in making such commutation his payment was limited to the acreage included in that entry. While no question seems to be raised as to his right to the transfer applied for because of the excess in area, it is required that he should make payment to the United States for such excess. In the opinion of this Department such requirement is but reasonable and fair. Had Bryars entered the same amount of land here applied for at the time of his original entry he would have been required when making commutation proof to pay for the same because the payment under the commutation clause of the homestead law is according to acreage. No hardship is therefore

visited upon him when making his transfer to require the additional payment for the excess over the amount included in his original entry where, as in this case, the original entry was perfected under the commutation provisions of the homestead law. The requirement made by your office and the local officers for such payment is sustained and to this extent your office decision is affirmed. Bryars should be advised hereof and afforded a reasonable time within which to make payment as demanded. Should he make the payment within the time allowed and no other sufficient reason appears for denying the transfer, the same should be accepted; otherwise, his application for transfer will stand rejected.

DESERT-LAND ENTRY—SUSPENSION—CONTEST—CHARGE.

PORTER v. CARLILE (ON REVIEW).

Where a desert-land entry is suspended by the land department prior to the expiration of the statutory life of the entry, for the purpose of investigating the character of the land, a contest against the same, charging that the land is non-desert in character, and also that the entryman has failed to comply with the law in the matter of reclamation, may be entertained in so far as it charges the non-desert character of the land, but should be dismissed as to the charge relating to non-compliance with law; and if as a result of the contest it be determined that the land is of a character subject to entry under the desert-land law, the suspension should be removed.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 28, 1906.* (J. L. McC.)

Herbert C. Porter has filed a motion for review of departmental decision of January 9, 1906 (34 L. D., 361), affirming the action of your office, dated July 31, 1905, in the matter of his contest against the desert-land entry of James M. Carlile for lots 1, 2, 3, 4, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, of Sec. 18, T. 17 N., R. 3 E., Greatfalls land district, Montana.

This entry is one of a number that were investigated by Special Agent Chadwick, and upon his report were suspended by your office letter of October 8, 1903. Porter filed contest affidavit February 17, 1904, charging that the land was non-desert in character; that one dollar per acre each year had not been expended on the land; that it was not susceptible of irrigation for the reason that there was no means by which it could be irrigated.

A hearing was had, as the result of which the local officers found that the land was desert in character; but that the entryman had not complied with the law as to irrigation, reclamation, and cultivation; that there were two small reservoirs on the land, but that "neither of them is of sufficient size to hold water enough, if filled,

to properly irrigate one-half acre of ground;" that "no ditches extend from either of them," and that if there did they would be "of no practical use for irrigating purposes," inasmuch as the land embraced in the entry is nearly all higher than the reservoirs; and that the total value of the improvements was about \$306. Therefore they recommended that the entry be canceled.

Your office, on February 18, 1905, sustained the judgment of the local officers. An appeal was taken to the Department. Subsequently it was discovered that the action of your office had been taken upon an incomplete record, it not having been observed at the time it was taken that the entry had been suspended prior to the initiation of contest. Thereupon the Department, on July 19, 1905, returned the record to your office for readjudication. Your office, on July 31, 1905, *supra*, readjudicated the case, instructing the local officers as follows:

The suspension of this entry, with the others, is parallel to the action taken concerning a large number of entries made in the Visalia, California, land district, by departmental order of September 12, 1877, in order to investigate the character of the land covered by such entries. Where a contest was filed against the Visalia entries during the period of suspension, it was held that there was no jurisdiction to entertain the contest until after the revocation of the order of suspension. (See 15 L. D., 234, and 16 L. D., 35.) Under the doctrine announced in the cases above referred to it is accordingly held that you were without authority to entertain this contest, which, when filed, should have been suspended and held subject to the result of the proceedings instituted by the government. Therefore the decision of this office, of February 18, 1905, is hereby vacated, there being no jurisdiction to entertain the contest; and in the event of this decision becoming final the contest will stand suspended pending the result of the investigation ordered by the government.

This is the action of your office that was affirmed by the Department in its decision of January 9, 1906, of which the contestant has now filed a motion for review.

The errors alleged are, in substance, that the departmental decision heretofore rendered erred in not holding that "all contests, though filed during the suspension of desert-land entries, stand as initiated, and will entitle the contestant to a hearing upon the withdrawal of the order of suspension;" in dismissing the contest, "for the reason that the testimony fully showed, and was satisfactory and conclusive, that the land in controversy was non-desert in character, that the entryman was not acting in good faith, and that there was no method by which the land could be reclaimed, or water placed thereon artificially;" and in not passing upon the question as to whether the land in controversy was non-desert in character.

The movant—and for that matter, the local officers, your office, and the Department in its decisions heretofore rendered—appear to have confused the issues in this case, to some extent, because of

contestant's having embraced in his affidavit of contest two diverse charges, which must receive different treatment at the hands of the land department: (1) the charge that the land is non-desert in character; (2) the charge that the defendant has not complied with the law as to reclamation.

Regarding the first charge the Department, in the very similar case of *Whitman v. Hume*, held as follows (34 L. D., 456, 457):

This question is one going directly to the validity of the entry in its inception, and one which, in the interest of both the government and the claimant, should be determined with as little delay as possible. Especially does the interest of a claimant demand an early determination of this question, that his rights may be definitely fixed, and his subsequent expenditure of labor and money in the required improvement of the land protected. Improvements made upon lands afterward declared to be non-desert in character, though ample under the requirements of the desert-land law, would not render an entry under that law valid, for if such entry was invalid because of the non-desert character of the land, no act of the claimant performed in an attempted compliance with the law would prevent cancellation, as an entry of land not desert in character is unauthorized by the desert-land law, and is not merely voidable, but absolutely void. Therefore justice demands the speedy ascertainment of the character of the land; and the rights of a claimant are not prejudiced by permitting, at any time, the initiation of a contest for that purpose, as his rights remain the same whether the object of the suspension be accomplished by contest, or by hearing ordered on behalf of the government.

The departmental decision heretofore rendered (January 9, 1906, *supra*) made no finding as to the character of the land involved in the case here under consideration. In view of the ruling in the *Whitman-Hume* case, above quoted, it would have been proper that such finding should have been made. The record has been informally withdrawn from your office, and carefully examined with reference to this question. It is found that the preponderance of evidence clearly shows that the local office and your office committed no error in finding that the land here in controversy was desert in character.

With reference to the second charge of the affidavit of contest—that the entryman has not complied with the law as to reclamation—attention is directed to the fact that Carlile made his entry on December 24, 1901, and that the same was suspended on October 8, 1903—one year, nine and one-half months after entry. This fact brings the case within the ruling in the case of *Whitman v. Hume*, syllabus (*supra*):

A contest charging that the entryman has failed to comply with the requirements of the law should not be entertained during such period, where the suspension becomes effective prior to the expiration of the statutory life of the entry.

It is clear, therefore, that the local officers and your office erred in considering any testimony offered in support of the allegation charg-

ing failure on the part of the claimant to comply with the requirements of the desert-land law. They were (as was held by your office and by the Department in its decision heretofore rendered) without jurisdiction to try that question.

Inasmuch as the testimony supports the concurrent findings of your office and the local office that the land covered by the entry is desert in character, and as no other question is in issue, the contest should be dismissed. The character of the land having been determined favorably to the claimant, the suspension as to the land embraced in his entry should be revoked, and he permitted to proceed with the perfection of his entry.

This is, not only in effect, but in fact, the substance of the decision heretofore rendered. The language in the last line thereof, stating that your decision was affirmed, when in fact it was affirmed only in part, and in part reversed, is evidently an inadvertence; it should have said, the contest is dismissed. This is what the movant clearly understands to be the meaning and intent of said decision, as is shown by his first allegation of error, which begins by saying, "The decision is erroneous in *dismissing the contest*," etc.

With the verbal correction above indicated, the departmental decision heretofore rendered is adhered to. The motion for review is dismissed.

SETTLEMENT PRIOR TO OPENING OF LAND TO ENTRY.

HANSON *v.* GAMMANCHE.

Settlement upon lands in advance of the hour of opening, in violation of an order of the land department prohibiting such settlement, confers no rights upon the settler as against the first legal applicant to enter the land after the hour of opening, and such settler can not, by virtue of his mere presence upon and occupancy of the land after the hour of opening, with the improvements made prior to that time, secure a settlement right.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 28, 1906.* (E. F. B.)

This appeal involves the right to the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, T. 145, R. 31 (Chippewa series), Cass Lake, Minnesota, embraced in the homestead entry of Dolphus Gammanche, made June 15, 1904, and claimed by George Hanson, who alleges priority of right in virtue of settlement upon the tract prior to the allowance of the homestead entry.

The land in question is part of the Chippewa lands that were opened to settlement and entry at 9 A. M. June 15, 1904. A notice was issued by the Department warning all persons not to go upon

said lands with a view to settlement thereon "until such lands have been formally opened to settlement and entry," and declaring that—

All such persons will be considered and dealt with as trespassers, and when the lands are actually opened, preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

Upon the filing of an affidavit by Hanson alleging priority of right, a hearing was ordered, and upon the testimony taken at such hearing, the local officers found that Hanson, having gone upon the land prior to the hour of opening in violation of the order of the Department, could not acquire by his illegal settlement superior right as against the first legal applicant, to whom the preference right was given by the express terms of the order of the Department. They recommended that Gammanche's entry remain intact and that Hanson's application be rejected.

Your office reversed their decision and held that as Hanson was a settler upon the land at 9 A. M., when the inhibition ceased, his occupancy of the land prior to the date of the opening did not affect his right as a settler, which attached from that moment. Gammanche's entry was held for cancellation and Hanson's application was allowed.

It has been held by the Department, in construing similar orders prohibiting settlement upon lands in advance of the hour of opening, where no statutory penalty is attached, that the premature occupancy of the land in violation of the order will not affect the right of the settler except so far as to preclude him from deriving any benefit from an illegal settlement; but if he is on the land at the hour of opening, he may, from that moment, secure a right by settlement, if he perform some personal act of settlement at that time or thereafter, by making a substantial improvement upon the land, and his right as a settler will commence from the making of such improvement.

He cannot, however, by his mere presence upon the land, with the improvements made prior to the hour of opening, secure a settlement right by virtue of mere occupancy alone, as that would be allowing a settlement commenced as a trespass and in violation of the order, to be perfected merely by lapse of time.

The testimony of Hanson is to the effect that he went upon the land at 2 A. M. the morning of the 15th of June, 1904, and moved in a house that he placed on the land in March previous and had furnished. He left the claim at 8:30 A. M. and did not return until dinner, but he left his family on the land and two men to put up notices and commence digging a well. On direct examination he testified that he commenced digging the well on the 15th, "right after dinner—one o'clock." On cross-examination he testified that he

commenced the addition to his improvements after he got through with the well, and when asked if it was the same day, said:

A. Well, my memory isn't very good. On June 17th, I commenced the well, and digging cellar. I had one man at the well and they dug the cellar under the addition that I—

Q. Did you commence digging your well on the 17th?

A. On the 16th, I commenced.

Q. Digging your well?

A. But we didn't finish it—it was incomplete. I had one man on the 17th on the well, and one man on the cellar under the addition.

Q. You commenced digging your well on the 17th?

A. On the 16th—or on the 15th I commenced.

P. H. Larson, a witness for Hanson, testified that he went to Hanson's claim on the morning of the 15th, reaching there about a quarter to nine. No one was in the house at that time, but Mrs. Hanson and Miss Hanson came there about 9 o'clock. He went there for the purpose of witnessing Hanson's settlement and posted notices. He also testified that he was on the land with Hanson at 9 o'clock A. M., and took dinner with him that day, but he makes no mention of the digging of a well, or the commencement of any other improvement that day, after 9 o'clock. He was asked when Hanson made his additional improvements, and answered that he did not know the exact date; that he would notice them when he would go upon the land from time to time. When he was on the land on the 26th of June, he noticed that Hanson had started work on the addition to his house by digging the cellar.

Helga Hanson, a daughter of contestant, who was claiming land in the adjoining section, testified that she was not on her father's claim at 9 o'clock; but at that hour she was on her own claim. She said she could not tell the day the well was commenced.

Gammanche testified that he first went upon the land at 1 o'clock P. M., the 15th of June, 1904, and made his entry at 3 o'clock that day. This is all that is material in his testimony, except his statement that Hanson did not commence the addition to his house until about four weeks prior to the date of hearing, and that he (Gammanche) had continued to reside on the land with his family since the first week in July, after the entry.

The contestant went upon the land in violation of the order of the Department with the evident purpose of placing himself in such situation as to acquire an advantage over others who had complied with the order when the hour of opening arrived. At 9 o'clock he was upon the land in a continued occupancy that was commenced in violation of the express order of the Department. As he could acquire no advantage by his occupation of the land at the hour of opening that was commenced in violation of the order, and could

derive no benefit from the improvements placed upon the land prior to the hour of opening, he could only initiate a settlement right after that hour by making some substantial improvement, independent of the improvements he had already placed on the land; and that must be shown by clear and satisfactory proof in order to defeat the entry made by the prior legal applicant. The removal of the inhibition by the arrival of the hour of opening did not convert unlawful occupancy into a valid settlement.

There is no clear and convincing testimony that Hanson performed any substantial act of settlement on the land the 15th day of June, 1904, after the hour of opening, independent of his previous acts. His testimony as to the day the digging of the well was commenced, is so indefinite that it can not be determined with any degree of certainty when it was commenced. He testified that on the morning of the 15th he left two men on the land to post notices and commence digging a well. Larson testified that when he went on the land, just before 9 o'clock, no one was there; but at 9 o'clock he was on the land with Hanson and his wife and daughter. He testified that he posted the notices. If he was one of the men to dig the well, he certainly could have testified as to the time it was commenced, and as he went there to witness the settlement of Hanson, it is hardly probable that such an important act as the digging of a well could have been performed that day without his attention being called to it and he surely would have known of the presence of the men who were to do the work if they were on the land on the morning of the 15th.

Your decision is reversed, and the entry of Gammanche will remain intact.

HOMESTEAD ENTRY—ADDITIONAL—KINKAID ACT.

GRAVES *v.* McDONALD.

Residence upon the land embraced in the original homestead entry is an indispensable prerequisite to the preference right to enter additional contiguous land accorded by the act of April 28, 1904.

An additional entry under the act of April 28, 1904, even though for a less amount of land than authorized by the act, exhausts the right; but where at the time the entryman sought to exercise his additional right, part of the lands contiguous to his original entry and subject to his preference right and desired to be entered by him, were found to be embraced within an existing though invalid additional entry made by another under said act, and he thereupon made entry for a less amount of land than he was entitled to enter, and thereafter by means of a contest procured the cancellation of the invalid entry covering the remainder of the lands desired by him, he may, upon the cancellation of such invalid entry, be permitted to enter such lands in accordance with his original intention.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 28, 1906.* (G. C. R.)

May 25, 1901, Henry E. McDonald made homestead entry for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, T. 24 N., R. 14 W., O'Neill, Nebraska.

July 1, 1904, he made an additional and preferential entry under section 2, act of April 28, 1904 (33 Stat., 547), for the SW. $\frac{1}{4}$, Sec. 2, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, all in said township.

Walter O. Graves, who entered the NE. $\frac{1}{4}$ of Sec. 11 of said township January 30, 1900, and who claimed as a preferential right under the act of 1904, *supra*, nearly all the land entered by said McDonald July 1, 1904, filed a contest against McDonald's additional entry July 18, 1904, alleging, among other things, that McDonald was not entitled to exercise a preferential right of entry for said lands for the reason that he had never established an actual *bona fide* residence on the land embraced in his original entry made in 1901.

Hearing was duly had and the register and receiver, December 12, 1904, found that McDonald, the contestee, was not residing on his original homestead on April 28, 1904, and therefore had no preferential right to the land in question. Upon this finding, the register and receiver held for cancellation McDonald's said preferential entry of the land and awarded to contestant the right to make entry thereof as additional.

On appeal, your office, June 22, 1905, affirmed the action of the register and receiver. Your office also held for cancellation contestee's original entry made as aforesaid, May 25, 1901.

From that action contestee has appealed to this Department, alleging error both of law and fact and especially contending that it was error to hold for cancellation contestee's original entry.

The second section of the act of April 28, 1904, *supra*, reads as follows:

That entrymen under the homestead laws of the United States within the territory above described who own and occupy the land heretofore entered by them, may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same.

It is obvious from a careful reading of this section that residence upon an original entry is a pre-requisite to the acquisition of con-

tiguous lands under the preference right awarded thereby to those who seek to avail themselves of that privilege.

The testimony has been carefully examined. Without setting forth the same in detail, it is sufficient to say that it appears from a preponderance thereof that the defendant-entryman up to the time of the initiation of this contest had not established and maintained a *bona fide* residence upon the tract originally entered by him, nor sufficiently improved the same. On the other hand, it clearly appears that Graves, the contestant, has resided with his family upon, and improved his original homestead entry from March, 1901, his improvements thereon being of considerable value.

It follows from the finding, which is in harmony with that of the local office and your office, that Graves has the better right in the premises.

This is not an ordinary contest as provided for in the act of May 14, 1880 (21 Stat., 140), where the contestant on securing the cancelation of an entry has a preference right to enter the land covered thereby. The contestant does not seek to enter the land covered by McDonald's original entry, but desires to enter other lands under the act of 1904, which are contiguous to those embraced in his original entry and which are not embraced in any original entry.

The lands embraced in McDonald's (contestee's) original entry, are not involved in this contest except in respect to the question as to whether he was such a resident thereon as is contemplated in the said act of 1904, and on this proposition it is seen that he has failed to make a satisfactory showing, yet, inasmuch as the matter is wholly between him and the government, there being no adverse claim, and as he may yet be able to make a better showing of compliance with the law, his original entry may remain intact.

Another question, not raised by the appeal or referred to by you, presents itself. It appears that Graves, the contestant, on July 19, 1904, entered the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2, of said township, as additional under the said act of April 28, 1904. Having made that entry, the question arises as to his right to make another additional entry under said act.

The Department has repeatedly held, notably in the recent case *ex parte* James W. Luton (34 L. D., 468), that one who has made entry under the act of April 28, 1904, has exhausted his right, and will not be permitted to make a second entry.

Your office states that the contestant, July 19, 1904, applied at the local office to make additional entry under said act of April 28, 1904, for the lands claimed by the defendant under his additional entry (or portions thereof). Finding the lands desired by him covered by the additional entry of the defendant, and believing the latter was

not qualified to make the entry because he had abandoned his original entry, he immediately sought to remove the barrier by bringing the contest, charging that default. One of the forty-acre tracts desired by him as additional was not embraced in the defendant's additional entry, and contestant entered it and immediately sought to remove the barrier which prevented his entry of the balance of the contiguous lands.

Under these circumstances, his entry of the rest of the desired lands under said act of 1904 can hardly be regarded as a second entry, as such proposed entry is in accordance with his clearly expressed purpose when he first appeared at the local office to make the additional entry.

Under the facts disclosed, his right to make the additional entry finds support in the case of Daniel L. Hartley (26 L. D., 663; Joseph Heisel, *idem.*, 69; Hadley *v.* Walter, 25 L. D., 276; and Ella Pollard, 33 L. D., 110).

Graves will be allowed to enter such of the tracts in controversy as will comply with the requirements of both compactness and contiguity.

With the above noted modifications, the action appealed from is affirmed.

OKLAHOMA TOWNSITE—RESERVATION OF LOT FOR PUBLIC PURPOSE—SECTION 4, ACT OF MAY 14, 1890.

OPINION.

The reservation of a lot in a townsite in the Territory of Oklahoma for the purpose of erecting thereon an armory for use of a company of the Oklahoma National Guard, constitutes a reservation for "the public interest" within the meaning of section 4 of the act of May 14, 1890, authorizing the Secretary of the Interior to reserve any undisposed-of lots in townsites in said Territory for "public use as sites for public buildings" if in his judgment "such reservation would be for the public interest."

Assistant Attorney-General Campbell to the Secretary of the Interior, March 28, 1906. (G. B. G.)

By your reference of the 26th ultimo, I am asked for opinion upon the question presented by the Commissioner of the General Land Office in a communication addressed to you February 19, 1906.

It appears from said communication and from other papers accompanying the reference that lot 19, in block 41, of the townsite of Alva, Oklahoma, is desirable for the purpose of erecting an armory thereon for the uses of Company I, Oklahoma National Guard, and it is claimed that a dedication of the lot to such use would save the expense to the United States government of the rent of a building for that

purpose, it being suggested that sufficient funds will be raised by private subscription to erect a suitable building on said lot.

The lot in question has heretofore been the subject of contest between two claimants, which contest resulted in it being held as an unclaimed lot, the claims of both contestants thereto having been rejected.

The land embraced in said townsite was entered under the act of May 14, 1890 (26 Stat., 109), as extended to the Cherokee Outlet September 1, 1893 (28 Stat., 11). Section 4 of said act of May 14, 1890, provides:

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

The act of July 7, 1898 (30 Stat., 674), abolished boards of trustees for townsites in Oklahoma, and vested in the Commissioner of the General Land Office authority to complete the trust with reference thereto. The title to the lot in question is in the United States for the use of said town, and the Secretary of the Interior, being the supervisory officer of the land department, is charged with the ultimate execution of that trust; and the question submitted is, "whether under the provisions of section four of said act of May 14, it would be proper to reserve said lot for the purpose mentioned."

I am of opinion that the reservation in question may be made. The legislation above quoted directs the sale "for the benefit of the municipal government" of all lots not disposed of as thereinbefore provided, but in terms also provides that "any part thereof may be reserved for public use, as sites for public buildings."

Inasmuch as the Oklahoma National Guard is established and maintained for the preservation of the public peace, and inasmuch as its maintenance in the town of Alva would contribute directly to the well-being of the inhabitants of that town, there would seem to be no doubt, and I advise you, that the reservation of the lot in question for the uses of said company would constitute a reservation for "the public interest" within the meaning of the statute, and therefore within the powers of the Secretary of the Interior.

The question which arises incidentally in the consideration of this matter, whether the United States may permit the erection of a public building upon its property by private subscription, is not within the reference, and is one upon which I express no opinion.

Approved:

THOS. RYAN, *Acting Secretary.*

BOWLBY *v.* HAYS.

Motion for review of departmental decision of January 10, 1906, 34 L. D., 376, denied by Acting Secretary Ryan March 28, 1906.

RECLAMATION ACT—HOMESTEAD ENTRY—AGREEMENT TO CONVEY LAND.

OPINION.

A homesteader whose entry is within the irrigable area of an irrigation project under the act of June 17, 1902, but not subject to the restrictions, limitations and conditions of said act, can not, under the law, prior to the acquisition of title to the land, enter into an agreement to convey to a water-users association any portion of the land embraced in his entry, to be held in trust by such association and sold for the benefit of the homesteader to persons competent to make entry of such lands.

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 29, 1906. (E. F. B.)

A letter from the Director of the Geological Survey relative to the disposal of excess holdings of lands within the limits of the Okanogan irrigation project, has been referred to me for opinion upon the question presented therein.

The question submitted by the Director is whether a homesteader whose entry is within the irrigable area of an irrigation project, but not subject to the restrictions, limitations and conditions of the reclamation act, may sell a relinquishment of part of his entry.

The purpose of the inquiry is to ascertain whether a homesteader, having such entry, who has not acquired title to his land, may convey, or agree to convey, to a water users association one or more legal subdivisions of his entry, to be held in trust by such association, and sold for the benefit of the homesteader to persons competent to make entry of such lands, under the same form and in the same manner now provided for the conveyance and sale of lands in private ownership lying within the limits of an irrigable area.

He cannot. One of the indispensable conditions of the homestead law is that the entry must be made for the exclusive use and benefit of the applicant and not "either directly or indirectly for the use or benefit of any other person." (Revised Statutes, Sec. 2290.) In submitting final proof, the entryman is required to make oath that "no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight" (Sec. 2291), which provides for alienation for church and cemetery purposes. Under such prohibition, "a contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void." *Anderson v. Carkins* (syllabus), 135 U. S., 483.

Until the homesteader has acquired either a legal or equitable title to the land, he cannot make an agreement to convey any portion of it that will secure to another any right or interest therein. He may relinquish all or parts of it, but the relinquishment must be to the United States and the land relinquished becomes public land subject to entry by the first legal applicant. If the land relinquished is within the irrigable area of a reclamation project, it becomes subject to the provisions of the reclamation act.

Approved:

THOS. RYAN, *Acting Secretary.*

RECLAMATION ACT—AUTHORITY TO DRILL WELLS.

OPINION.

The drilling of wells in the vicinity of an irrigation project, for the purpose of determining whether underground water exists that may be made available in connection with the project, comes within the power conferred by the second section of the act of June 17, 1902, "to make examinations and surveys . . . for the development of waters."

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 30, 1906. (E. F. B.)

A letter from the Director of the Geological Survey, accompanied by a contract entered into by the Reclamation Service in behalf of the United States for the drilling of wells within the limits of the Salt River irrigation project, has been referred to me for opinion "as to whether or not the enclosed contract, under the facts stated in this letter, can be lawfully approved."

It cannot be ascertained from the face of the contract whether the work stipulated for is or is not authorized by the act, but the Director in his letter states that—

The proposed wells are for the purpose of determining the depths to water and are strictly analogous to the Diamond drill work so extensively carried on by the Reclamation Service for determining the conditions of foundations for various structures.

The underground supply will form an important factor in the Salt River project and will furnish irrigation for a considerable area. The wells in question are for the purpose of determining the conditions upon which future construction is to be based and other wells will be required before contracts can be let for the necessary pumping plants.

It appears from the statement of the Director that the wells stipulated for in the contract are not artesian wells and hence there is nothing in the opinion of March 3, 1903 (32 L. D., 278), referred to by the Director, that bears directly upon the question involved in this reference.

The Director states that the feasibility of the method of irrigating lands from the underground water supply has been fully demonstrated and is not experimental. This, as I understand, is stated as a general proposition without reference to any particular locality, and the drilling of the wells referred to in the contract is for the purpose of determining whether the underground water in the locality referred to can be reached at such depth as to be made available by means of pumping and thus form an important factor in the Salt River project. The practicability of this scheme can only be ascertained by experimental investigation, not with reference to the method, but whether such method is practical in the locality contemplated. Such investigation would seem to be authorized by the power conferred by the second section of the act "to make examinations and surveys. . . . for the development of waters."

The feasibility of the Salt River project has already been determined. The action now contemplated is for the purpose of ascertaining whether or not the water supply can be increased from the underground flow by practical methods and thus enlarge the irrigable area. That fact can only be properly determined in the manner suggested by the Director.

I am of the opinion that the execution of the contract is a valid exercise of the power and authority conferred by the act and it can lawfully be approved.

Approved:

THOS. RYAN, *Acting Secretary.*

CONTEST—NOTICE—CHARGE—ACT OF JUNE 16, 1898.

COLLEGE v. SUTHERLAND.

Objection to the jurisdiction of the local office, on the ground that the record does not afford due proof of service of notice of contest, is not well founded where the fact of legal service is not denied.

In case of a contest against a homestead entry on the ground of abandonment, it is not essential that the charge in the affidavit of contest, required by the act of June 16, 1898, that the entryman's absence was not due to service in the army, navy or marine corps, shall follow the wording of the statute, it being sufficient if the language employed in effect or by necessary implication excludes military, naval and marine corps service as the cause of the entryman's absence.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 30, 1906.* (D. C. H.)

The record shows that on March 31, 1900, Isaac E. Sutherland made homestead entry for the NE. $\frac{1}{4}$ of Sec. 13, T. 154 N., R. 81 W., Minot,

North Dakota, and that on July 11, 1904, Jesse College filed contest against said entry, charging abandonment and failure to reside upon and cultivate said land as required by law, and that the entryman's absence from the claim was not due to his employment in the army or navy of the United States in time of war. Notice issued and on the day set for trial, September 8, 1904, contestant appeared in person and by attorney. The defendant appeared specially by attorney and objected to the jurisdiction on the ground that there was no proof of service of the notice of contest on file in the case, and offered in evidence the record as it then stood, in which appeared an affidavit made by E. W. Hockspier in which it is stated that on the third day of August, 1904, he served the attached notice of contest on Isaac E. Sutherland by delivering to and leaving with said Sutherland a copy of said notice, and that he knows the person so served to be the identical person named in said notice as the contestee therein. The attention of the local officers being directed to the fact that no copy of the notice was attached to the affidavit of service and that neither the original notice, nor a copy thereof, appeared in the record at that time, the case was then adjourned until 2 o'clock P. M. of the same day, when the parties again appeared as before, and Hockspier, who made the aforesaid affidavit, identified a copy of the notice, then produced, as a true copy of the notice served by him on the contestee, which said copy was then attached to his affidavit of service. Whereupon the contestee, still appearing specially, moved that the contest affidavit be rejected and the contest dismissed on the ground that the affidavit of contest was insufficient to warrant the cancellation of the entry, which motion was sustained, and the local officers also at that time ruled that there was no evidence of proof of service of the contest notice filed with the papers in the case. The local officers on December 6, 1904, filed a formal decision in the case in which they held that the affidavit of contest was insufficient in that it did not allege that defendant's absence from the claim was not due to employment in the marine corps in time of war, and dismissed the contest on that ground alone, and held that such disposition of the matter rendered it unnecessary to consider the question as to the proof of service of the notice of contest.

Your office, upon appeal by contestant, on June 30, 1905, reversed the action of the local officers, held the affidavit of contest and the service of notice sufficient to give jurisdiction, and remanded the case to the local officers for a hearing upon the charges set forth in the affidavit of contest. Defendant has appealed to the Department and has based his appeal upon the following alleged errors:

(1) Error in holding that the local officers had jurisdiction upon proof of service made, to take testimony in the case.

(2) Error in holding that the allegations of the contest affidavit were sufficient to warrant a cancellation of the entry.

First: It will be noted that the defendant does not question or deny the fact that notice of the contest was duly served upon him; the objection being only as to the proof of the service of said notice. The question presented and involved was well and carefully considered by the Department in the case of *Franson v. Baker*, 21 L. D., 383, and it was therein held that—

An objection to the jurisdiction of the local office, on the ground that the record does not afford due proof of service of notice, is not well taken where the fact of legal service is not denied.

See also *Hausen v. Ueland*, 10 L. D., 273.

Second: It not being specified in appellant's second assignment of error in what essential particular the affidavit of contest is insufficient, said assignment will be considered as challenging the affidavit generally, and as intended to apply to all the allegations contained therein. In the first place, it may be said that in order to determine the sufficiency of an affidavit of contest as the basis for a hearing, it is only necessary to consider whether or not, if any one or more of the charges taken singly, or all the charges taken together as a whole, be established, the entry should be canceled. (*Harper v. Eiene*, 26 L. D., 151.) The affidavit here in question alleges that the said entryman has not resided on said tract as required by law; that he has changed his residence therefrom for more than six months since making his entry; that said tract is not settled upon and cultivated by said party as required by law; and that his absence from the land is not due to employment in the United States army or navy in time of war. Considering these allegations together as a whole, it seems clear that if a hearing be had thereon and the truth of said allegations be established by proper proof, defendant's entry must be canceled. (*Smith v. Johnson*, 9 L. D., 255, 258.)

The act of June 16, 1898 (30 Stat., 473), provides that thereafter no contest against a homestead entry shall be initiated on the ground of abandonment unless it be alleged in the preliminary affidavit of contest that the entryman's absence from the land was not due to his employment in the army, navy or marine corps of the United States in time of war, and as the local officers held the affidavit of contest in the case at bar to be fatally defective in that it did not, in express words, state that the defendant's absence from the claim was not due to his employment in the marine corps of the United States, and as your office in the decision appealed from, reversed their said holding, it may be well to consider and pass upon this matter in this appeal.

The law recognizes marines as part of the navy. In the case of the *United States v. Dunn* (120 U. S., 249, 254), which involved the

question of the proper position of the marine corps in the military service, the court held that—

The marine corps is a military body designed to perform military services, and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the navy, and accompanying or aiding naval expeditions;

and—

that the primary position of that body in the military service is that of a part of the navy, and its chief control is placed under the Secretary of the Navy.

Marines being recognized and considered a part of the navy, the affidavit in question is therefore not faulty or bad because it does not in express words charge that the entryman's absence from the claim was not due to his employment in the marine corps.

It may be added that while a contest against an entry involves the forfeiture thereof, and must be sustained by full proof, yet it is not technically such a penal proceeding as requires that the allegations of the contest affidavit shall be set forth with the same degree of particularity as is required in framing an indictment for a criminal offense.

The use of any words in the affidavit which in effect or by necessary implication exclude military, naval or marine corps service as the cause of the entryman's absence will suffice to satisfy the requirement of the act of June 16, 1898, *supra*, whether the technical words of the act are employed or not, such words being in substance a compliance with the statute.

The affidavit of contest in this case being in the opinion of the Department sufficient in all the material allegations as a basis for a hearing, the decision of your office is hereby affirmed.

**HOMESTEAD—ADJOINING FARM—ADDITIONAL—SECTIONS 5 AND 6, ACT
OF MARCH 2, 1889.**

JOHN DENNY.

One who has exercised the homestead privilege, even though for less than 160 acres, and thereby exhausted his homestead right, is disqualified to make an adjoining farm entry under section 2289 of the Revised Statutes.

The right to make an additional entry accorded by section 5 of the act of March 2, 1889, arises only where the original entry was made prior to the passage of said act, and can be exercised only upon land contiguous to that embraced in the original entry; but the additional entry provided for by section 6 of said act may be allowed whether the original entry was made prior or subsequent to the passage of said act and for land contiguous or noncontiguous to the original entry.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 30, 1906.* (D. C. H.)

It appears from the record that on February 21, 1891, John Denny made homestead entry at the Springfield, Missouri, land office for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 30, T. 28. N., R. 17 W., containing eighty acres, and that he received patent for same March 18, 1897; that on September 10, 1898, said Denny made at the same land office an additional homestead entry for the S. $\frac{1}{2}$ of lot 1, SW. $\frac{1}{4}$ of Sec. 7, T. 24 N., R. 14 W., containing forty acres; that proof in support of said entry, as and for an adjoining farm entry, was made February 27, 1905, and final certificate issued thereon March 1, 1905, the entryman stating in his final certificate that he owned and has continued to own and reside upon the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 24 N., R. 14 W. (which constitutes his original farm and deeded tract), since November 18, 1898, and it appearing from the final proof that claimant has resided upon the said SW. $\frac{1}{4}$ of the said Sec. 7 and has cultivated the same in connection with the tract covered by his additional entry since the aforesaid date.

Your office, by decision of September 20, 1905, held that the additional entry should not have been allowed, because there is no provision of law under which an additional homestead entry may be made as an adjoining farm entry, and allowed claimant sixty days within which to show cause why his additional entry and the final certificate issued thereon should not be canceled for illegality. Denny has appealed from your said judgment to the Department, and in his appeal represents that the additional entry was made as an adjoining farm entry and that since making said entry he has continued to reside upon his adjoining deeded land and has improved and cultivated the same in connection with the forty acres here in question and that in making his additional entry he was misled by the local officers, who informed him that he had a right to make the entry as an adjoining farm entry, and claimant now asks in his appeal to be allowed to amend the character of said entry to that of actual residence and cultivation under such regulations as may be proper and equitable.

From the facts disclosed it is apparent that Denny's last entry and final certificate thereon must be canceled. It cannot be allowed to stand under section 2289 of the Revised Statutes as an adjoining farm entry to the land purchased by and deeded to him, because by his original homestead entry of the now patented land, he exhausted his homestead right under that section. It cannot be permitted to stand under section 5 of the act of March 2, 1889 (25 Stat., 854), because his original homestead entry was made subsequent to the passage of that act, and also because the land now sought is not contiguous to

the said original entry. Upon the cancellation of Denny's said last entry as herein directed, no reason is seen why he may not, if he so desires, be allowed to enter the land included therein as an additional homestead entry under section 6 of said act of 1889, subject to full compliance with the law under the provisions of said section.

You will so advise claimant, allowing him a reasonable time within which to make said additional entry, if there be no other valid objection. Thus modified, your decision is affirmed.

TIMBER AND STONE ACT—EXECUTION OF AFFIDAVIT.

ANNIE DAVIES.

The affidavit or sworn statement required of an applicant to purchase under the timber and stone act must be sworn to in the county, parish or land district where the land is situated; and where in such statement the land intended to be taken is incorrectly described, and an application to amend the original statement so as to properly describe the lands desired is filed, the amendatory affidavit must be sworn to in the same manner as required in case of an original affidavit.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) _____ *Office, March 31, 1906.* (G. C. R.)

June 30, 1904, Annie Davies applied to purchase under the timber and stone act, lot 1, Sec. 4, lots 3 and 4 and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, T. 2 N., R. 43 E., Lagrande land district, Oregon. Notice was duly published fixing September 22, 1904, for offering proof before the register and receiver.

October 3, 1904, she filed in the local office her petition to amend her entry and re-advertise to make proof. In it she alleged that she desired, intended to describe, and thought she had described, lot 4 and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, and lots 1 and 2 of Sec. 4 of said township. She asked to amend accordingly.

Her petition was supported by three witnesses and was sworn to before a notary public "residing at Spokane," Washington.

The register and receiver, erroneously passing upon the merits of the petition to amend, instead of transmitting it for your action, as they should have done under the rule, rejected the same, and, on appeal, your office affirmed that action, August 21, 1905.

The application to amend the entry was rejected because the same was sworn to before an officer who was not qualified, that officer not living in the county, parish or land district in which the land is situated—not even in the same state. Claimant, through her attorney, has appealed to the Department.

Section 2294 of the Revised Statutes, as amended by the act of March 4, 1904 (33 Stat., 59), provides:

That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law.

Appellant contends that a mere application to amend is not required to be sworn to in the county, parish or land district where the land is situated; that the applicant in fact swore in her original application that she wished to enter the land as described in her amended application: that is, she had that in mind, and her oath referred to it, and not to the land erroneously described by the writer, whose mistake it was.

It is insisted that the affidavit to amend merely explains the error made in the original affidavit, and that she is not attempting to make a new sworn statement, but only to explain the first one.

Practical difficulties are suggested in the statement that the corroborating witnesses are now far away from the land, and their presence in the district difficult, if not impossible to procure. She adds that she has already spent much money to secure the land and does not wish to be burdened with the expense incident to making another sworn statement in the county, district, etc. where the land is situated.

It is very unfortunate that the alleged error was made in the matter of the description of the desired lands. That mistake, however, claimant, through her agent, is solely responsible for.

If these affidavits describe the wrong lands or lands not desired by the applicant, the essential requisite for the allowance of an entry is wanting. An application to enter, of necessity, is addressed to a specific tract, and to correct an error in that respect is, in effect, to make a new application.

While the affidavit supporting the petition to amend explains the mistake made in the first affidavit, it is nevertheless the only affidavit

which correctly describes the lands desired. Claimant does not want the land her original affidavit described; hence that affidavit is useless. Her so-called explanatory affidavit is really the only affidavit which expresses her wishes in respect to the lands desired. To require her to make the affidavit before a qualified officer may cause her much inconvenience, but the law requires it and this Department has no power to relieve her.

The action appealed from is affirmed.

REJECTED HOMESTEAD APPLICATION—NOTICE—APPEAL.

SPALDING *v.* HAKE.

Where a foreign-born homestead applicant fails to file with his application proof of naturalization, or that he has declared his intention to become a citizen of the United States, it is within the discretion of the local officers to receive and hold the application and afford the applicant an opportunity to furnish the required proof, or to reject the application outright, in which latter event it can have no effect to segregate the land from other appropriation.

An appeal from the rejection of a defective application to enter does not operate to reserve the land and entitles the applicant only to a judgment as to the correctness of such action at the time it was taken, and where the application was properly rejected, it is immaterial, in the face of an adverse appropriation of the land, whether the applicant received proper notice of such action.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, March 31, 1906.* (C. J. G.)

An appeal has been filed by Martin Hake from the decision of your office of May 31, 1905, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of Sec. 5, T. 158 N., R. 81 W., Minot, North Dakota, and finding that Albert Spalding has the superior right to the land.

January 2, 1903, Spalding made homestead application for said land, stating therein: "That I have declared my intention to become a citizen of the United States. That certified copy of such declaration of intention is hereto attached." The application was rejected by the local officers February 28, 1903, "for the reason that there are no citizenship papers accompanying same." On the same date notice of the rejection was sent to Spalding, in care of D. C. Greenleaf, Minot, North Dakota, although Spalding's post office address was stated in his homestead application to be Lamberton, Minnesota. He was allowed thirty days in which to appeal to your office. March 6, 1903, Martin Hake filed homestead application for the land, which was held in abeyance pending Spalding's exercise of his right of

appeal, and April 11, 1903, no such appeal having been filed, Hake was allowed to make the homestead entry in question.

September 10, 1903, Spalding filed an appeal to your office, alleging error on the part of the local officers in rejecting his application without giving him opportunity to furnish his citizen papers; in allowing the Hake entry in the absence of notice of the rejection of his own application; and in not sending notice of the rejection of his application to the record address. In an affidavit accompanying the appeal Spalding alleged that he employed D. C. Greenleaf to act as scrivener for the sole purpose of making out his homestead application papers; that said Greenleaf did not at any time have authority to further represent him in the matter; and that he had no knowledge until recently of the rejection of his application. With his appeal Spalding filed a certified copy of his declaration of intention to become a citizen of the United States.

January 13, 1904, your office called upon Hake to show cause why his entry should not be canceled and the application of Spalding allowed, finding that while the action of the local officers in rejecting the application of Spalding was "undoubtedly correct," yet their omission to properly notify him of the fact was error that should not be allowed to defeat his rights.

Hake answered, stating that he made his entry in good faith, having been informed and believing that Spalding's application was properly rejected; that ever since he has been in undisputed possession of the premises, having established residence thereon within six months from date of entry; that he has erected thereon a dwelling house, habitable at all seasons of the year, and broken eight acres and put the same in condition for next season's crop; and that Spalding has never established residence nor made any improvements whatever on the land. Your office found, however, that while these things show Hake's good faith, there is nothing in his answer to controvert the claim of Spalding who under all the circumstances has the superior right to the land.

A foreign-born applicant is required under the homestead law to furnish proof of naturalization, or that he has declared his intention to become a citizen of the United States, the usual method in the latter event being to accompany his application with a certified copy of his declaration. This proof is a condition precedent to making entry under said law. The local officers were undoubtedly warranted, as held by your office, in rejecting the application of Spalding for absence of the required citizenship proof, and it is no answer to their action to say they might have held said application and notified Spalding with a view to his curing the defect. It is true they might, within their discretion, have done this thing, in which event his application would for the time have been a pending application

barring the receipt of any other. But they did not take this course and their action was fully justified. As said in the case of Santa Fe Pacific Railroad Company (33 L. D., 161): "Power to reject an improper application is incident to their office under the laws for organization of the land department." In the analogous case of Charles H. Cobb (31 L. D., 220), it was said:

An imperfect selection, such as this, should have been rejected by the local officers at once, upon its presentation. It was not incumbent upon them to invite the selector to present the requisite proofs and to await his action in that matter. Unless his selection conformed to the law and regulations, he was not entitled to have it received by the local officers and noted upon the records of their office.

Therefore Spalding gained nothing as against an adverse claim by the filing of his imperfect application. It is contended on his behalf, however, that as said application stated that he had declared his intention to become a citizen, it was the duty of the local officers to notify him of the failure to attach the necessary evidence thereto, so as to afford him an opportunity to furnish the same, and for this reason his application, although rejected, "in a measure segregated said tract." For obvious reasons this point can not be sustained. But your office holds that because of the failure of the local officers to properly notify Spalding of the rejection of his application, the application of Hake was prematurely allowed, that is, before the thirty days' right of appeal of Spalding had expired. This would undoubtedly be true if it had been found that Spalding's application was improperly rejected. Otherwise he could gain nothing by appeal, and consequently he was in no way prejudiced by the alleged want of proper notice. An appeal from the action of the local officers rejecting his application could have entitled him only to a judgment as to the correctness of such action at the time it was taken. *Eaton et al. v. Northern Pacific Railway Company* (33 L. D., 426). It is well settled that an appeal does not operate to save or create rights not secured by the application itself. *Maggie Laird* (13 L. D., 502). An application to enter properly rejected does not operate to reserve the land covered thereby, even though an appeal is taken from the order of rejection. *McInturf v. Gladstone Townsite* (20 L. D., 93). Hence, Spalding's application having been properly rejected because defective, and it not being incumbent upon the local officers to notify him with a view to affording him an opportunity to cure the defect, and especially as they did not do so in this case, an appeal by him could not have operated to reserve the land from Hake's entry and he could not have been allowed to complete his application in the face of the adverse claim.

There is another cogent reason for holding intact the entry of Hake. Granting there has been no bad faith on the part of either of

the parties to this controversy, it is a well established theory in equity that when one of two persons must suffer a loss it should be borne by that one who by his conduct, acts, or omissions, has rendered the injury possible. The error in the first instance here was clearly on the part of Spalding, and as a result of that error Hake was permitted to make entry. He has since established residence on the land and has expended time, money and labor in its improvement. Under the circumstances it is entirely appropriate to invoke equitable consideration in behalf of his claim.

Each case of this character must be determined on its particular facts and merits. It is not believed the conclusion reached herein conflicts with the decision in the case of *Johnston v. Bane* (27 L. D., 156), nor that in *Junkin v. Nillsson* (28 L. D., 333), the facts in those cases not being identical with the facts of the one here under consideration. As stated, the equities in favor of Hake constitute one of the controlling features of this case.

The decision of your office is reversed, Spalding's application is rejected, and Hake's entry will remain intact.

RECLAMATION ACT—APPLICATIONS FOR WATER RIGHTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 4, 1906.

Registers and Receivers, United States Land Offices.

GENTLEMEN: In connection with the various reclamation projects which have been undertaken by the Government under the provisions of the act of June 17, 1902 (32 Stat., 388), the Department has adopted the plan of having water-users' associations organized within such projects, the incorporators and holders of which are owners and occupants of the land embraced therein, and when so organized the Secretary of the Interior enters into contracts with such associations and they become, as it were, an integral part of the project and directly associated with the Government in carrying out the details thereof. Upon the execution of such contracts, the relation of the association to the Government as the representative of the water users and as the medium of communication between the water users and the Government, is formally determined.

As a means of accomplishing this object, the Department has adopted two forms of applications for water rights, viz., Form "A" (4-021) for homesteaders who have made entries of lands withdrawn

under the second form of withdrawal, and Form "B" (4-020) for private owners of lands embraced within said project, and these forms (copies of which will be furnished you) will be used in all applications for water rights in any of the reclamation projects within your district. For the procedure contemplated in filing and acceptance of water rights you are informed that—

1. Upon notice authorized by the Secretary of the Interior that the Government is ready to receive applications for water right for described lands under a particular project, all persons who have made entries of lands under the provisions of the act of June 17, 1902 (32 Stat., 388), will be required to file application for water rights on Form A for the number of acres of irrigable land in the farm unit entered, as shown by the plats of farm units approved by the Secretary of the Interior.

2. Upon the issuance of such notice private land owners shall, in like manner, apply for water rights for tracts not containing more than 160 acres of irrigable land, according to the approved plats, unless a smaller limit has been fixed as to lands in private ownership by the Secretary of the Interior. Form B is intended for use by such applicants.

3. The amount of water to be furnished per annum per acre of irrigable land will be fixed by the Secretary of the Interior for each project, as it will depend upon the varying local conditions.

4. Information as to the number of annual installments required to be paid, the amount of each, and the time when the same shall be due, will also be furnished prior to the time when water right applications can be received.

5. If the Secretary of the Interior has made a contract with a water-users' association organized under the project, due notice thereof will be given to the registers and receivers, and applications for water rights should not be accepted in such cases unless the certificate at the end thereof has been duly executed by the said association.

6. The Reclamation Act provides that a private land owner who makes application for water right thereunder shall be "an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land." Each application on Form B must contain a statement as to the distance of the applicant's residence from the land for which a water right is desired. The limit of distance will be fixed by the Secretary of the Interior for each project, depending on the local conditions. The local land officers will be notified as to this limit when notice is given that water-right applications may be accepted. If a greater distance is shown in any application, the case should be reported to the Commissioner of the General Land Office for special consideration upon the facts shown. If the applicant is

an actual *bona fide* resident on the land for which water-right application is made, the clause in parentheses of Form B, regarding residence elsewhere, must be stricken out.

7. The applicant on Form B must state accurately the nature of his interest in the land. If this interest is such that it can not ripen into a fee-simple title at or before the time when the last annual installment for water rights is due, the register and receiver must reject the application.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved, April 4, 1906.

E. A. HITCHCOCK, *Secretary*.

HOMESTEAD-NEBRASKA LANDS-ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *April 10, 1906.*

REGISTERS AND RECEIVERS,

United States Land Offices, Nebraska.

GENTLEMEN: The circular of instructions relative to the act of Congress approved April 28, 1904 (33 Stat., 547), entitled "An act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska," which was approved May 25, 1904 (32 L. D., 670), was amended August 21, 1905 (see 34 L. D., 87), and is hereby reissued, modified as follows:

It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, which was marked in red ink upon maps transmitted with said circular, upon and after June 28, 1904, except for such lands as might be thereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed two miles in extreme length.

Under the provisions of the second section, a person who within the described territory has made entry prior to April 28, 1904, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, and no other disqualification to make homestead entry exists, may make an additional entry of a quantity of land contiguous to his said homestead entry which, added to the area of the original entry, shall make an aggregate area not to exceed 640 acres; and he will not be required to reside

upon the additional land so entered, residence upon the original homestead entry being accepted as equivalent to residence upon the additional land so entered. But residence either upon the original homestead or the additional land entered must be continued for the period of five years from the date of the additional entry.

A person who has a homestead entry upon which final proof has not been submitted and who makes additional entry under the provisions of section 2 of the act, will be required to submit his final proof on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact a form as possible, and the extreme length of the combined entries must not in any event exceed two miles.

In accepting entries under this act compliance with the requirement thereof as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

By the first proviso of section 3 any person who made a homestead entry prior to his application for entry under this act, if no other disqualification exists, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence upon and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries. But the application of one who has an existing entry and seeks to make an additional entry under said proviso, can not be allowed unless he has either abandoned his former entry, or has so perfected his right thereto as to be under no further obligation to reside thereon; and his qualifying status in these and other respects should be clearly set forth in his application.

Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre, and such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries.

In the making of final proofs the homestead-proof form will be used, modified when necessary in case of additional entries made under the provisions of section 2.

It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price, viz: At the time the application is made \$14, and at the time of making final proof \$4, to be payable without regard to the area embraced in the entry.

In case the combined area of the subdivisions selected should, upon applying the rule of approximation thereto, be found to exceed in area the aggregate of 640 acres, the entryman will be required to pay the minimum price per acre for the excess in area.

Entries under this act are not subject to the commutation provisions of the homestead law.

In the second proviso of section 3 entrymen who had made their entries prior to April 28, 1904, were allowed a preferential right for ninety days thereafter to make the additional entry allowed by section 2 of the law.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

SCHOOL LAND—RIGHT OF WAY—ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

The grant of sections sixteen and thirty-six made to the Territory of New Mexico for school purposes by the act of June 21, 1898, is a grant *in praesenti*, and any question as to the authority of the Territory to grant rights of way for railroads across any such lands is one for determination by the officers of the Territory and not by the Secretary of the Interior.

Assistant Attorney-General Campbell to the Secretary of the Interior, April 11, 1906. (G. B. G.)

In a communication of February 5, 1906, addressed to the Secretary of the Interior by the Commissioner of Public Lands for the Territory of New Mexico, it is stated that applications have been made by railroad companies for rights of way across school sections sixteen and thirty-six, it being contended by such companies that these applications should be allowed in accordance with section 13, chapter III, Territorial Laws of New Mexico, of 1905, the material part of which is as follows:

That the Commissioner of Public Lands may grant the right of way across or upon any portion of the territorial lands upon such terms as he may deem for the best interests of the territory for any ditch, reservoir, railroad and sign on behalf of the territory a proper deed or instrument of writing for such right of way or sale.

Said Commissioner asks to be advised "with reference to the rights of the Territory in the matter of a right of way to a railroad company across a school section," and by your reference of the 27th ultimo I am asked for opinion upon the question presented.

I have to advise you that in my judgment the question is not one for the consideration of this Department. The act of June 21, 1898 (30 Stat., 484), made a grant *in praesenti* of the lands in question to the Territory of New Mexico, with a restriction upon the power of alienation, it being therein provided that these lands might be "leased only" by the Territory. Yet, while it is true that this grant was a present one (Territory of New Mexico, 29 L. D., 364), it is also undoubtedly true that the Congress of the United States may still enforce the conditions of the grant in any appropriate manner (see *Emigrant Co. v. County of Adams*, 100 U. S., 61, 69); but I fail to perceive that the Secretary of the Interior is charged with any duty in the premises, advisory or otherwise. If a situation were presented which would seem to require investigation as a basis for a report to Congress, in the discharge of general duties devolving upon the Secretary of the Interior under section 442 of the Revised Statutes, it would, I think, be your duty to direct the investigation, but no such situation is here presented. (See my opinion of February 19, 1906, 21 Opinions Assistant Attorney-General, 390.) Here is an act of the territorial legislature, a copy of which has presumably been filed with the Congress of the United States, pursuant to the provisions of section 1850 of the Revised Statutes, and if that body should not choose to take action thereon, it remains for the courts eventually to determine the legality of such legislation.

There is nothing to investigate, and I think the Commissioner of Public Lands should look to the law officers of the Territory for opinion as to his authority and duty in the premises.

Approved:

E. A. HITCHCOCK, *Secretary*.

UINTAH INDIAN LANDS—WITHDRAWAL FOR RESERVOIR PURPOSES—
ACT OF MARCH 3, 1905—LEASE.

OPINION.

There is no authority for leasing lands formerly within the Uintah Indian reservation and withdrawn generally for reservoir purposes under the act of March 3, 1905, where such lands have not been appropriated for any particular purpose so as to take them out of the category of public lands.

Assistant Attorney-General Campbell to the Secretary of the Interior,
April 11, 1906. (E. F. B.)

A letter from the Director of the Geological Survey, dated March 17, 1906, has been referred to me for opinion as to whether lands

formerly within the Uintah Indian reservation, and now withdrawn for reservoir purposes under authority of the act of March 3, 1905 (33 Stat., 1048, 1070), may be leased for grazing purposes until the lands are needed for the uses contemplated by their withdrawal.

Reference is made by the Director to my opinion of March 10, 1906 (34 L. D., 480), as authority for the leasing of such lands.

That opinion was given upon the question as to the right of the Secretary of the Interior to lease lands withdrawn or purchased for reclamation purposes under the act of June 17, 1902 (32 Stat., 388); but it was based upon the general principle that in the absence of any express prohibition as to the particular property, the head of the executive department in whose care and custody public property is placed to be used for a particular purpose, may, until the property is needed for the purpose intended, exercise his judgment and discretion as to the proper care and disposition of such property and any use of it not incompatible with the purpose intended is not a diversion to other uses and is neither a violation of law nor an abuse of the supervisory authority and discretion reposed in him.

It was also stated that the Secretary of the Interior has no authority under his general power of supervision and control over the public lands to lease them unless expressly authorized by Congress. Special provision having been made for the disposal of public lands, any other manner of disposition is excluded, being impliedly prohibited.

The lands in question were withdrawn under authority of the act of March 3, 1905, *supra*, which empowered the President, prior to the opening of the Uintah Indian reservation, "to set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development."

If these lands have been permanently appropriated to a particular use, as in the case of lands appropriated for the construction of irrigation works under the act of June 17, 1902, and have been disposed of so far as to take them out of the category of public lands, the principle announced in the opinion of March 10, 1906, would authorize the leasing of them.

It does not appear, however, that they have been appropriated for any purpose. They are simply reserved public lands that may, or may not, be used for the purposes intended by their reservations, and the vacating of the order of reservation would, of its own force, subject them to disposal as other lands of the reservation.

As they are not a part of an irrigation project to be constructed under the act of June 17, 1902, the rental from these lands would not be covered into the treasury as a part of the reclamation fund—even if there was no question as to the authority to lease.

I advise that there is no authority to lease these lands and the application should be rejected.

Approved:

E. A. HITCHCOCK, *Secretary*.

REPAYMENT—PAYMENT IN CASH AND BY LAND WARRANT.

HEIRS OF JOSE G. SOMAVIA.

A pre-emption entryman who paid double minimum price for lands supposed to be within the limits of a railroad grant, but which were subsequently held not to be within such limits, is entitled to repayment of the excess of one dollar and twenty-five cents per acre paid by him; but where payment was made partly in cash and partly by land warrant, the Secretary of the Interior has no authority, in making repayment, to draw his warrant for an amount greater than the cash payment made by the entryman; and in such case, where the amount of the cash payment is not sufficient to make the repayment due the entryman in full, he may be permitted to make an additional cash payment of such an amount as added to the sum originally paid by him in cash will aggregate the cost of the land at one dollar and twenty-five cents per acre, and thereupon have the land warrant returned to him unsatisfied.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 12, 1906.* (J. R. W.)

The heirs of Jose G. Somavia appealed from your decision of July 15, 1905, refusing to return to them military bounty land warrants Nos. 113411 and 33104, act of March 3, 1855 (10 Stat., 701), respectively for one hundred and sixty and eighty acres.

November 12, 1878, Somavia made final proof of his pre-emption claim to lots 1, 2, 3 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 2, T. 17 S., R. 4 E., M. D. M., San Francisco, California, and in payment located warrant 113411 for 160 acres on lots 1, 2 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, 98.82 acres, and paid \$47.05 as and for an excess of 18.82 acres. In payment for lot 3, 45.47 acres, he located warrant 33104, and as and for an excess of 5.47 acres he paid \$13.68. This occurred from the fact that the lands entered were at that time by the land department held and supposed to be double minimum lands within the limits of the grant to the Atlantic and Pacific Railroad Company, made by the act of July 27, 1866 (14 Stat., 292), but was afterward held not to be within such limits by decision of March 23, 1886, in Atlantic and Pacific Railroad Company (4 L. D., 458). Due to the former erroneous holding Somavia's warrants were credited upon his entry for half of their area, and he was required to pay and did pay two

dollars and fifty cents per acre for the excess of 24.29 acres of his pre-emption—144.29 acres over the area of his 240 acres of land-warrants credited at half their area or 120 acres. April 15, 1880, patents issued to him for the lands so entered.

June 21, 1902, application was made to your office by J. T., J. R., and R. M. de Somavia for return of these warrants. Therewith was filed an affidavit by Robert A. Fatjo and Eugene M. Don that they were personally acquainted with Jose G. Somavia, the entryman, and know of their own knowledge that he died about May 16, 1900, that the applicants are his sole heirs, and are all of full age of twenty-one years. The applicants offer to pay the full sum of one dollar and twenty-five cents per acre of the entry, less the \$60.73 paid at the time as excess.

Your decision held that (1) the warrants were satisfied, at least in part, by the entryman's acceptance of the patents, which would have to be returned and canceled, and title to the land be reconveyed to the United States before return of the warrants; (2) that while the double minimum price should not have been exacted, and an equity to reimbursement exists, yet your office is not authorized to return the warrants; (3) that the proof of right in the applicants is insufficient, in that their relation to the entryman is not stated, or facts upon which their heirship is based are not stated, but a mere conclusion of law only, and the application was denied.

The result is that he paid, under an erroneous ruling of the land department, part in warrants and part in money, the double minimum price for land that afterward was found not to be within the limits of a railroad grant, and, had the entire payment been made in money, he would be entitled under section 2 of the act of June 16, 1880 (21 Stat., 287), to repayment of the excess above one dollar and twenty-five cents per acre. Frederick W. Frese (5 L. D., 437). But as it was a mixed payment—only part in money—the Secretary of the Interior has no authority to draw his warrant on the Treasury for repayment of the one dollar and twenty-five cents per acre of the entry in money. Sylvester Kipp (24 L. D., 538); Albert Nelson (28 L. D., 248).

But in the latter case it was held that for such part of the excess paid as remains in the custody of the Department, the error may be corrected. In that case the entire payment was in surveyor's scrip, and the excess amount was returned. In discussion of the subject the Department held:

It was wrong to exact this, and to retain it would be to continue the wrong. While the consideration remains in the hands of this Department the mistake may and should be corrected. It comes within the principle announced by Attorney-General John Nelson, in 4th Opinion of Attorney-General, page 227; wherein he said:

"In reference to cases of error arising out of miscalculations of the amounts to be paid, I have had more difficulty. Money thus paid is never properly in the treasury of the United States. It is paid and received by mutual mistake and as long as it remains in the hands of the receiving officer I can perceive no good reason why, upon the discovery of the error, he should not be authorized to correct it. After it has found its way into the treasury, however, like all other money, it should be withdrawn in strict fulfillment of the requirements of the law, which the administrative power or the executive department of the government can not control."

The certificates surrendered by the applicant as the consideration for the land are in the custody and under the control of the Department, and justice and equity demand that the mistake should be corrected.

The obligation to be just rests alike on governments as on persons. In case of governments the difficulty in granting relief arises from the peculiarity of their organization, but when brought to the bar of the court, the same principles determine their obligation in business transactions as apply to individuals. In the present case the land department in disposal of public lands exacted from the pre-emption claimant warrants for 240 acres of land and the price of 48.56 acres more for half the quantity, 144.29 acres. This exaction was not a voluntary payment, as, under the erroneous construction of law then prevailing, his pre-emption would have been forfeited and his right lost. The obligation remains to return the exaction, now that the error is confessed. The land warrants can not be divided, but the real transaction was a pre-emption entry for 144.29 acres, for which he made proof and in payment located a land warrant for eighty acres, and should have paid \$80.37, but actually paid only \$60.73 in money. Adjusting the considerations that actually passed as ratable as the indivisible character of the land warrants permits, without exacting more than he was required to pay, the warrant for eighty acres can be satisfied; the parties can complete the cash payment by paying \$19.64, and the warrant for one hundred and sixty acres can be returned unsatisfied. This is within the power of the land department, and in view of the character of mixed considerations is the equitable and nearest possible approximation to an accurate ratable adjustment.

The objection made by your office to the sufficiency of proof of the right of claimants to Somavia's succession is well taken and is approved. The claimant, however, should be permitted to make proper proof.

Your decision is vacated, and your office will return the one hundred and sixty acre warrant, upon the applicants making proof satisfactory to your office that they are the sole heirs of the entryman and entitled by succession to him to claim the property, paying \$19.64 to complete the entry.

MINING CLAIM—NOTICE OF APPLICATION FOR PATENT—EXCLUSION OF CONFLICT.

RICHMOND AND OTHER LODE CLAIMS.

A recital of exclusion of conflict in the notice of an application for patent to a mining claim as effectually eliminates the conflict area as if the exception and exclusion were in terms declared in the application for patent itself.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 12, 1906.* (F. H. B.)

August 25, 1904, N. R. Bagley made entry (No. 1726) for the Richmond, Argonaut, and Sunny Jim lode mining claims, survey No. 16933, Durango, Colorado, land district. In the entry and in the published and posted notice of the application for patent all conflicts with surveys Nos. 1125, 1179, 1335, and 2183, the Bond, Wolverine, Mountain Maid, and Cacique lode mining claims, respectively, were expressly excluded.

It appearing, however, from the field notes of survey that the area claimed and paid for includes two tracts, "A" and "B," described in those notes and indicated on the official plat of survey, which are embraced in the excluded conflicts with the first three claims above mentioned, your office, by decision of February 28, 1905, held in substance and effect that, as it does not appear that the claimant has been awarded the tracts by judgment of a court, if he desires to retain any portion thereof it will be necessary regularly to republish and repost notice of his application as to so much, and that, if no adverse claim is filed, he may thereafter enter and pay for the additional land. Failing such supplemental proceedings and in the absence of appeal, it was stated, within sixty days from receipt of notice, the entry would pass to patent exclusive of all conflicts with the surveys mentioned. Your office also remarked an unexcluded conflict with the Pacific lode claim, survey No. 835 A, for which, it was stated, application for patent had been filed.

The claimant has appealed to the Department. In that behalf he cites paragraphs 39 and 46 of the mining regulations (31 L. D., 474, 481, 482), prescribing the data which the published and posted notice must contain, and urges that in the present case "all of the data required by said paragraphs was contained in the various notices and no question as to this has been raised by your office." He also cites that portion of paragraph 52 of the regulations which provides that upon submission of proof of publication and posting, etc., the register will "permit the claimant to pay for the land according to the area given in the plat and field notes of survey," which he avers to have been done in this instance; and he concludes as follows:

All of the conflict with the conflicting surveys named is not excluded from this entry either in statement or in fact, but patent is asked for, and payment

was made for, a specific number of acres, to-wit, 26.035 acres, exclusive of conflict with certain surveys, exactly as stated in the field notes.

A comparison of the field notes and plats of the several surveys in conflict will disclose the fact that patent is asked for in this case for such area as was heretofore excluded from the other surveys and abandoned by claimants of Sur. No. 835 A.

There can be no doubt that the two tracts in question are not available to the claimant under his pending patent proceedings. The present difficulty with respect to those tracts would seem to have arisen from a too literal regard for the general language of portions of the mining regulations and a corresponding disregard of the letter and purpose of the mining statutes themselves.

It is carefully provided by those statutes that of each application for mineral patent notice shall be published and posted, whereby all others who may have or claim adverse interests may be warned and afforded opportunity to assert their claims in season. In other words, precisely what is sought to be secured by the application must be disclosed by the published notice, the notice posted in the local office, and the notice posted upon the claim. Upon these several elements or parts of the prescribed notice, and each of them, all others who may have or claim conflicting interests have a full right to rely; and any recital therein of exclusion of conflict as effectually eliminates the conflict area as if the exception and exclusion were in terms declared in the application for patent.

It is true that the data contained in the field notes, illustrated by the official plat, constitute the official and controlling advice of the *locus* and extent of the claim or claims for which patent is sought. It by no means follows, however, that the claimant is entitled to receive, or may secure, patent to all the land described in the field notes and shown upon the plat as embraced in his claim or claims. It often happens that in the official survey of a claim a conflict with another claim is included as part and parcel of the former and so described in the field notes and exhibited on the plat, but that thereafter and even after his application is filed, threatened with an adverse claim and a suit thereunder, the claimant waives his claim to the conflict area by an express exclusion thereof recited in his published and posted notice.

In this case unqualified exclusions, embracing the two tracts in question, were recited in the published and posted notice of appellant's application for patent, and as such were carried into the entry; and the contrary assertion made and conclusion expressed in his appeal, as above quoted, are inaccurate. It is clear, in this connection, that in scanning the mining regulations, whose provisions he invokes, appellant did not give due observance to the concluding clause of paragraph 39, whereby, speaking of the notice to be posted

in each case in a conspicuous place on the claim concerned, the claimant is admonished that—

Too much care cannot be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

The decision of your office is affirmed.

MINING CLAIM—EXPENDITURE—WAGON ROADS.

DOUGLAS AND OTHER LODES.

The cost of construction of such portions of wagon roads, used in the transportation of supplies to and ore from a mining claim or claims, as extend beyond the boundaries of the latter can not be accepted in satisfaction of the statutory requirement with respect to the expenditure in labor or improvements for patent purposes; the connection between the outlying portions of the roads and active mining operations or development being too remote to justify their acceptance.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 13, 1906.* (F. H. B.)

June 24, 1903, H. E. Miller *et al.* made entry (No. 715) for what is called the Douglas group, consisting of the Douglas and ten other lode mining claims, survey No. 1990, Carson City, Nevada, land district. The eleven claims are contiguous.

It appearing that the Douglas and Lookout were the only claims of the group upon or for the benefit of which the requisite improvements had been made, the entrymen were called upon to show, by proper certificate of the surveyor-general, that the statutory expenditure had been made upon each of the claims prior to expiration of the period of publication; upon pain of cancellation of the entry except as to the Douglas and Lookout claims.

In response there was submitted, on behalf of the entrymen, a supplemental certificate by the surveyor-general and corroborated affidavit of the deputy mineral surveyor who surveyed the claims, in which a number of buildings on the group and several miles of road are given as additional to the improvements originally certified, and from which it appears that subsequent to the survey and prior to the expiration of the period of publication a tunnel improvement upon the Douglas and Lookout claims had been extended at a cost of \$11,174.60.

Upon consideration of the supplemental showing your office, by decision of January 16, 1905, said and held as follows:

The extension of tunnel A within the Lookout and Douglas locations and the shafts, raises, inclines and winzes in connection therewith is valued at \$11,174.60. Of the buildings mentioned only the boarding house valued at \$780, the bunk house valued at \$560, can be accepted as having been constructed in compliance with the statute requiring certain expenditures on lode claims.

No specific showing is made as to how the roads mentioned tend to promote the extraction of mineral from the claims except that some of them are necessary for the transportation of machinery and supplies to the mines. The other portions are used for the transportation of ores to the smelter to be treated. The smelter is not an improvement tending to promote the extraction of mineral from the claim (see 31 L. D., 37). A similar holding was made by this office in letter "N" of April 15, 1904, to the local officers at La Grande, Oregon. This being the case, the road leading thereto could not be accepted as an improvement tending to promote the extraction of mineral from the claim. Only a small portion of the road was constructed except that leading to the smelter. This portion, together with the buildings, which, as above stated, might be accepted as proper improvements, distributed *pro rata* among the claims is not sufficient to make the expenditure on any individual claim amount to \$500, excepting the Morning Star, Francis, Douglas and Lookout claims. The tunnel above referred to, as stated in Mr. Mack's affidavit, is shown to have been made for the benefit of the Lookout and Douglas and has been extended toward and is shown to tend toward the development of the Francis claim also. The Morning Star is separated from the Lookout, Douglas and Francis claims by the Constitution and Relief locations, upon which but a small amount has been expended, and therefore in case of cancellation of the entry as to the Constitution and Relief locations, could not be embraced in the same entry with the Lookout, Douglas and Francis claims. Aside from the Morning Star and the three last named claims the showing made is not considered sufficient. The entry is accordingly held for cancellation as to all of the claims except the Lookout, Douglas and Francis locations.

From that decision the entrymen have appealed to the Department.

The expenditures upon the several claims of the group, in improvements consisting of tunnels, shafts, and cuts, were originally certified as follows:

Morning Star claim	\$419.22
Azurite claim	71.96
Relief claim	27.96
Sunlight claim	256.84
Coppersmith claim	88.89
Francis claim	410.83
Douglas claim	7,213.37
Lookout claim	149.99
Constitution claim	13.33
Hope claim	7.50
Golden Gate claim	20.00
Total	8,679.89

Of the claims of the group the Douglas alone was thus accredited with sufficient individual improvements to sustain an entry. It was

remarked by your office that the improvements upon that claim appeared to benefit the Lookout claim.

The tunnel, referred to in the supplemental certificate as having been extended at a cost of \$11,174.60, has its portal at or near the northerly boundary of the Lookout and extends in a northerly direction for some distance within the boundaries of the adjoining Douglas claim and in the direction of the next adjoining Francis claim. It is specifically certified, with respect to this extended tunnel, that it develops the mineral deposits of the Douglas and Lookout claims, tends to develop the deposits of the Francis claim, and will, when extended from its face into the Francis claim, develop and be a means of working and mining the mineral-bearing rock in place in the Francis. Under this certificate your office accepts the extended tunnel as an improvement for the common benefit of the three claims mentioned in that connection, and the Department sees no reason to question that finding. This disposes of the tunnel improvement as it now stands.

Additional individual improvements upon the Douglas and Lookout claims are given, but are of no concern here.

The buildings and structures upon the claims consist of a boarding house, office, two bunk houses, two cellars, blacksmith shop, stable and powder house, of the total value of \$2,030. With respect to them it is certified—

that said structures hereinbefore mentioned are all necessary to carry on the work of mining on said claims, as the workmen are obliged to live and eat upon the claims, by reason of the distance between said mines and any other houses, and that said office, blacksmith shop, cellars, stable and powder house were also constructed for and used to carry on the business of mining upon said claims.

In the same connection, in an affidavit by H. E. Miller, one of the entrymen, it is alleged:

As for the house, stable, cellars, blacksmith shop, they have been in almost constant use since construction and are now being used with material enlargements.

The long distance from supplies, such as fresh meats, milk, and vegetables, makes the provision of store house, cellars and powder houses necessary.

If it were decisive of the question here, it being affirmatively made to appear that these improvements are essential to mining operations and are utilized and employed for those purposes, the Department would be disposed to hold that they might be accepted as improvements for the benefit of the claims within the requirements in that behalf.

However, by an apportionment of the value of the structures among the eleven claims of the group, and for which the credit is offered, as additional to the certified individual credits set forth in the foregoing table, the requisite amount would not be reached with respect to others than the Francis, Douglas, Lookout (which shared

the tunnel improvement), and Morning Star claims, and the latter being some distance removed from the three first mentioned, could not be embraced in the entry. Other sufficient general improvements must therefore appear.

Two of the principal roads mentioned in the supplemental certificate are shown by a blueprint diagram thereto attached to traverse the Coppersmith, Sunlight, Lookout, Douglas, and Francis claims. From the last mentioned claim one road extends first to the north and then to the west, without the group, reaching and entering upon the Azurite and cutting the northwesterly corner of the Morning Star. Another of the roads, marked on the diagram "Road from tunnel A to Bluestone smelter," extends from the southerly end of the group in a northeasterly direction, cutting the southeasterly corner of the Golden Gate claim in its course, for much the greater part outside the group. Still another road, marked on the blueprint "road to Douglas office," extends from what is indicated as junction 4, a little south of the northerly boundary of the Francis claim, in a northeasterly direction, almost its entire length outside the group, to a junction with the "road from tunnel A to Bluestone smelter." In addition, two and a half miles of road, wholly outside the group and leading "to water," extend to the south and west of the group.

These roads are stated, both by the deputy mineral surveyor and by the affiant, Miller, to have been constructed by the entrymen and their grantors, prior to the survey, for the purpose, and are used, for hauling machinery and supplies to the claims as well as ore therefrom; and their total value is given as \$2,150. Affiant Miller alleges that the road leading to the Bluestone smelter connects with a road leading to a near-by town and some distance further to a station on a line of railroad.

In the view which the Department has taken of wagon roads generally as mining improvements, particularly where they are not wholly upon the claims involved and are devoted to the transportation of supplies to and ore from the claims, but a fraction of the value of those certified here, and representing such portions of the roads as are within the boundaries of the group, could be accepted, in the most favorable view of their serviceability in the direct promotion of the development of this group. See Copper Glance Lode (29 L. D., 542); Highland Marie and Manilla Lode Mining Claims (31 L. D., 37, 38-9). The connection between the outlying portions of the roads and active mining operations or development is too remote to justify their acceptance as a credit. The addition of the acceptable fraction, if it were feasible to determine the availability of the roads actually within and upon the claims, would still fail to satisfy the statutory requirement so far as concerns others of the group than those last above named. The Department fully recognizes the good faith of

these entrymen as manifested in an expenditure of nearly \$25,000 in the various improvements; but the bulk of this expenditure is represented in the tunnel improvement for the benefit of the Douglas, Lookout, and Francis claims, to which it is specifically accredited in the certificate, and is therefore unavailing as to the remainder of the group.

The decision of your office is affirmed.

**SOLDIERS' ADDITIONAL APPLICATION-WITHDRAWAL UNDER THE
ACT OF JUNE 17, 1902.**

CHARLES A. GUERNSEY.

An application to enter under the provisions of section 2306 of the Revised Statutes, even though approved by the Commissioner of the General Land Office, will not, prior to the allowance of entry thereon, prevent a withdrawal of the land covered thereby under provisions of the act of June 17, 1902.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 13, 1906.* (E. O. P.)

Charles A. Guernsey has appealed to the Department from your office decision of July 13, 1905, holding for cancellation his entry, made under the provisions of section 2306, Revised Statutes, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33, T. 27 N., R. 66 W., 6th P. M., Cheyenne land district, Wyoming, for the reason that said entry was erroneously allowed by the local officers after the withdrawal of the land in question under the provisions of the act of June 17, 1902 (32 Stat., 388).

The claimant, claiming as assignee of Jeduthun L. Twitchell, upon whose military service and original homestead entry his claimed right is based, filed his application to enter the land in question with the local officers, June 4, 1901, which application was transmitted by them to your office and its allowance directed by your office letter of May 27, 1902. Final certificate, however, was not issued by them until November 11, 1904. February 14, 1903, the land in question was withdrawn from entry under the provisions of the act of June 17, 1902, *supra*.

The first, second, fourth and fifth specifications of error allege, in substance, that your office erred in holding that said land was in any manner subject to withdrawal under departmental order of February 11, 1903, and in the argument in support of this contention it is urged by counsel that the application of Guernsey, filed June 4, 1901, the allowance of which was directed by your office May

27, 1902, prior to the issuance of said order of withdrawal, when followed by the payment of the required fees and issuance of final certificate, November 11, 1904; formed one transaction, which upon completion took effect, by relation, from the date of the initial act, and operated as a complete segregation of the land from that date, June 4, 1901.

The third specification of error is believed to have reference to cancellation of entries made necessary because the land was needed for construction purposes. As there is nothing in the record to show that the entry in question was canceled for the reason assigned in the third specification of error, and as it is not necessary to a decision of the question presented to rely upon such ground to sustain the action of your office, it will not be further considered by the Department.

The naked contention that an application to enter under the provisions of said section 2306, *supra*, amounts to a segregation of the land, sufficient to prevent a withdrawal of the land applied for under the terms of the act of June 17, 1902, *supra*, finds no support in the prior decisions of the Department. (Nancy C. Yapple, 34 L. D., 311.) Paragraph 4, of departmental instructions of June 6, 1905 (33 L. D., 607, 608), referring to lands which "may be irrigated" under the contemplated project, reads as follows:

Lands withdrawn under the second form can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation act, and all applications to make selections, locations, or entries of *any other kind* should be rejected whether they were presented *before or after* the lands were withdrawn.

It has been decided by the Department that applications to enter under the provisions of said section 2306 are not such applications as may be allowed under the language used in this paragraph. (Cornelius J. MacNamara, 33 L. D., 520; William M. Wooldridge, 33 L. D., 525.) By the further terms of said paragraph it is wholly immaterial whether the applications to enter be presented "*before or after* the lands were withdrawn," and the Department is firmly of opinion this direction is fully warranted by the letter and intent of the statute.

Applications to purchase under the provisions of the timber and stone act are in all essential respects similar in effect to applications made under the provisions of section 2306, *supra*, and it has been repeatedly held by the Department that such applications do not operate to segregate the land applied for nor prevent its withdrawal under the provisions of the act of June 17, 1902, *supra*. Board of Control, Canal No. 3, State of Colorado *v.* Torrence (32 L. D., 472); Jones *v.* Northern Pacific Ry. Co. (34 L. D., 105); Todd *v.* Hays,

on review (34 L. D., 371). Applications to enter under the provisions of said section 2306, and applications to purchase under the timber and stone act, give to the applicant, *as against other individuals*, a preference right to proceed under the application to perfect title to the land sought to be entered, but until the entry is complete, no rights are acquired against the government. The reason appears from the clear language of the act authorizing a withdrawal of the land for reclamation purposes. No specific lands are excepted from the operation of the order of withdrawal by the terms of the act, and in the departmental instructions prepared in accordance therewith, the only lands specified are those covered by "any valid entry, location, or selection which *segregated* and *withheld* the lands embraced therein from other forms of appropriation at the date of such withdrawal" (33 L. D., 607).

That an application to enter under section 2306, *supra*, is not an entry of the land applied for is self evident, and that it is not a "selection or location" which segregates or withholds the land applied for, as against the United States, is equally well settled by departmental construction of the act in question.

Until an entry is complete there is no vested right, and until an applicant is in position to maintain a claim to such right there is no segregation of the land within the meaning of the act of June 17, 1902, *supra*.

The Supreme Court of the United States, in the case of *Frisbie v. Whitney* (9 Wall., 187, 195), in defining the rights of the United States as against a person claiming a right under the pre-emption law, quotes with approval the language of different Attorneys-General, as follows:

Attorney-General Cushing, in an opinion given in 1856, says: "Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States, except such as the acts of Congress confer; and these acts do not confer upon the pre-emptor, *in posse*, any right or claim to be treated as the present proprietor of the land, in relation to the government."

In the matter of the Hot Springs tract of Arkansas, Attorney-General Bates says: "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred upon the settler to purchase land in preference to others . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government."

In the matter of this same Soscol Ranch, Attorney-General Speed asserts the same principle. He says: "It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government . . . The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money."

The right of a pre-emptor, acquired by settlement, was essentially similar to that secured by the filing of an application to enter under the provisions of said section 2306, *supra*, and like it can be set up as against individuals but cannot prevail as against the government. In neither case is the right a vested one. The right vests only when the application is followed by actual entry, properly allowed. The term "entry" has a definite and well-settled meaning, and in no sense is the term "application" equivalent in effect. (*Hastings, etc. Railroad Co. v. Whitney* (132 U. S. 357, 363); *Todd v. Hays*, on review (34 L. D., 371, 374). An entry can only be made of lands subject to individual appropriation (*Chotard et al. v. Pope et al.* (12 Wheat., 586, 588). If at any time prior to completion of an entry, the land applied for be withdrawn, it ceases to be subject to appropriation except in accordance with the terms of the order of withdrawal, the mere preference right gained by the filing of the application can not be set up to defeat such withdrawal by the government.

The fact that the allowance of the application by the local officers had been directed by your office prior to the passage of the act by virtue of which the withdrawal was subsequently made, does not, of itself, give any greater force and effect to the application, and if, prior to the actual entry of the land and issuance of final certificate thereon, in accordance with such direction, the land is withdrawn from entry, the inchoate right conferred by the filing of the application is, as against the government, cut off and determined, and an allowance of such application and the issuance of final certificate by the local officers subsequent to such withdrawal, is erroneous and such entry should be canceled. In such case the withdrawal of the land applied for prior to a full compliance with the directions to the local officers to allow the application, is a revocation of such direction and an entry thereafter allowed by them, unless in strict accord with the order of withdrawal, is invalid. The entry in question was not such a one as could properly be allowed under the order of withdrawal withdrawing the tract involved, and was, therefore, subject to cancellation.

Counsel for appellant lays much stress upon the fact that this applicant had done all that he could do to make entry of the land and that a cancellation of his entry under such circumstances involves a hardship not contemplated by the statute authorizing the withdrawal thereof. An examination of the records of your office discloses that on May 27, 1902, you notified claimant's attorney of record of the action taken by you directing the allowance of the entry in question, yet no steps were taken to perfect the entry until November 11, 1904, nearly two and a half years thereafter. Surely it cannot be seriously

contended that the preference right conferred would, unless the laches were excused, be extended over such a period even as against other applicants, much less against the government. Yet if it be conceded that claimant's contention is well founded, still his rights can be no greater than those conferred by the statute granting them, and must, as stated by the Supreme Court of the United States in the case of *Frisbie v. Whitney* (*supra*, 197)—

be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether hard or lenient.

See also *Rector v. Ashley* (6 Wall., 142, 151).

It having been decided that prior to the withdrawal of the land claimant had acquired no vested interest therein, no act of his could relieve against the application of the terms of the statute, and no exception been found therein sufficient to protect his claimed right, the same must be denied and his entry, erroneously allowed by the local officers after withdrawal of the land, must be canceled.

The decision appealed from is accordingly hereby affirmed.

FOREST RESERVE—LIEU SELECTION—ACTS OF JUNE 4, 1897, AND
MARCH 3, 1905.

MARY E. COFFIN.

In case a selection under the exchange provisions of the act of June 4, 1897, is canceled for conflict with a prior settlement claim, and another selection for a like quantity of land is made in lieu thereof, under the proviso to the act of March 3, 1905, the abstract of title of the relinquished land assigned as a basis for the selection must be extended to the date of the later application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) April 16, 1906. (C. J. G.)

Mary E. Coffin has appealed from the decision of your office of August 16, 1905, cancelling her selection No. 2164 made under the act of June 4, 1897 (30 Stat., 36), for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 65 N., R. 18 W., Duluth, Minnesota, in lieu of the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, T. 28 N., R. 14 W. (excepting one acre in the northwest corner), and the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, T. 29 N., R. 3 W., W. M., in the Olympic forest reserve, Washington, relinquished to the United States.

There were two deeds of relinquishment covering the tracts designated as base lands, dated February 5, and March 6, 1900, recorded March 9, and 10, 1900, respectively, and the lieu selection was made

March 16, 1900, the same being for unsurveyed land. Your office approved the selection December 16, 1902, making the approval thereof and the issuance of patent dependent upon the adjustment of the selected land to the lines of public survey when the plat of survey of said land should be filed. The official plat of survey was filed in the local office February 8, 1905, and on that day, as reported by the local officers, "there was filed an affidavit by the selector conforming said selection to the plat of survey." On the same date one Polydore Aubin filed homestead application for the land covered by the lieu selection, alleging settlement thereon in 1898. A hearing was had in the matter with the result that on March 28, 1905, the local officers rendered decision in favor of Aubin. Mary E. Coffin acquiesced in this decision and on April 11, 1905, she, by F. A. Coffin, attorney in fact, filed application to be permitted, by reason of the conflict with the prior settler's claim, to change her lieu selection so as to substitute for the land embraced therein, the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 19, T. 64 N., R. 17 W., Fourth P. M., Duluth, Minnesota, at the same time relinquishing and releasing all her right, title and interest in and to the land originally selected. There was also filed a non-mineral and non-occupancy affidavit as to the land sought to be substituted.

In the decision herein appealed from your office, in view of the acquiescence of the selector in the decision of the local officers adverse to her, revoked its letter of December 16, 1902, which approved selection No. 2164, and canceled said selection, concluding as follows:

You will notify the selector that she will be permitted to file in a reasonable time a new application accompanied with deed, non-mineral and non-occupancy affidavit, and abstract of title brought down to date—with usual certificates as to title not being encumbered with judgment liens, taxes, etc. At same time furnishing an affidavit that she is not the owner of the one (1) acre of land situated in the northwest corner of SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, Tp. 28 N., R. 14 W., mentioned in deed as excepted.

The appeal alleges error (1) "in canceling said selection and requiring an entirely new application, deed, etc., instead of regarding applicant's affidavit of adjustment of Feb. 8, 1905, as a part and continuation of said application;" and (2) "in requiring the abstract of title to be brought down to date."

The act of June 4, 1897, *supra*, was repealed by the act of March 3, 1905 (33 Stat., 1264), the proviso thereto being as follows:

That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patent issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

The circular instructions of May 16, 1905 (33 L. D., 558), issued to local officers in relation to said proviso, prescribes, among other things:

Should application be presented under this provision of the law you will be careful to see that same is in strict compliance with the instructions of July 7, 1902 (31 L. D., 372), except that instead of the showing specified in section 22 of such instructions the selector will be required to file his affidavit setting out the facts as to the prior selection in lieu of the relinquished tract, including the date when and place where such selection was made; the description of the land selected; the General Land Office number of such selection, and the date when finally rejected and canceled, so that it may clearly appear therefrom that the original selection was pending and not finally adjudicated on March 3, 1905.

From all of which it may fairly be deduced that the language of the act, "another selection," contemplates not a change or substitution of description in the pending invalid selection application but a *new* application. It is not entirely clear what object the selector can have in view in insisting that her affidavit of adjustment of February 8, 1905, be regarded as a part and continuation of the original application. In no event could a substitution of other land be held to relate back and be effective from the date of the presentation of the original invalid application. Another selection whether by way of substitution or new application could be effective only from the date it is made, accompanied by the required proofs, especially as to the character and condition at that time of the land applied for. Even if it were held that the original selection might be completed by the substitution of another tract of land in place of that covered by the invalid selection, still the proofs would have to be brought down to date in any event. In this connection, answering appellant's second assignment of error, the rule is well established that where an application to select lieu lands is rejected because defective and a corrected application is subsequently filed, the abstract of title of the relinquished land must be extended to the date of such subsequent application. C. W. Clarke (32 L. D., 233); Thomas F. Arundell (33 L. D., 76). The reasons for applying the same rule are equally cogent in a case where another selection is made under the proviso to the act of March 3, 1905.

If it was intended by your office to require the selector to execute a new deed, or deeds, of relinquishment, that was unnecessary as the deeds already furnished and on file, if in proper form, are sufficient upon which to base the new selection.

With the modification indicated the decision of your office herein is affirmed.

RECLAMATION ACT—CONSTRUCTION OF IRRIGATION WORKS BY CONTRACT OR BY "FORCE ACCOUNT."

OPINION.

Under the authority conferred upon the Secretary of the Interior by the act of June 17, 1902, he may, in his discretion, enter into contracts for the construction of irrigation works or construct such works by labor employed and operated under the superintendence and direction of government officials.

Assistant Attorney-General Campbell to the Secretary of the Interior,
April 16, 1906. (E. F. B.)

A letter from the Director of the Geological Survey of April 12, 1906, has been referred to me for opinion as to whether the Secretary of the Interior has authority to construct irrigation works by "force account," and if so, to what extent.

The second section of the act of June 17, 1902 (32 Stat., 388), authorizes and directs the Secretary of the Interior to "construct, as herein provided, irrigation works for the storage, diversion and development of waters." He is authorized and directed to withdraw lands for that purpose and to determine whether or not said project is practicable, and by the fourth section of the act it is provided:

That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund.

In view of the specific direction that the Secretary "may cause to be let contracts for the construction of the same," an opinion is requested as to whether he may also construct such works by labor employed and operated under the superintendence and direction of the government officials.

The solution of this question depends upon whether the power conferred by the fourth section of the act is mandatory or directory only, or whether it is such a specific direction as to the manner in which the work is to be performed as to exclude all other.

The word "may" as it is ordinarily used signifies that it is authorization and not command, unless the power conferred is to be exercised for the public interest, or to enforce a private right; or unless it is evident from the plain scope and purpose of the act that it was the intention to impose an imperative duty and not to confer a discretionary power. Black on Statutory Construction, Sec. 69. United States v. Thoman, 156 U. S., 353, 359.

Again, "when the words of a statute are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer

or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often are, construed to be directory." Black on Construction, Sec. 124.

The primary power conferred by the act upon the Secretary of the Interior is to construct irrigation works for the storage and development of waters, when in his judgment the cost of the works, considered with reference to the quantity and character of the lands that may be irrigated therefrom, will justify their construction. The cost of construction is therefore a controlling factor in determining whether an irrigation project is practicable. The duty imposed upon the Secretary of the Interior to estimate the cost of construction of a contemplated project with a view to determine whether it is practicable, of itself implies a power to adopt the most feasible manner and means of executing the work, and to accomplish the purpose intended by the act, unless there is some positive limitation as to the exercise of such power. If there is such limitation it can only be found in the fourth section of the act, but as the language employed implies discretion rather than command, and as nothing can be gathered from the spirit and purpose of the act or from the context, to indicate that it was the intention to impose an imperative duty, the word "may" as used in that part of the section quoted from, must be taken to confer a discretionary power and not to limit or restrict the authority of the Secretary of the Interior to employ such means in the construction of works as in his judgment would be most feasible.

I am of the opinion that the Secretary of the Interior may construct and fully complete irrigation works under the provisions of the reclamation act by "force account."

Approved:

E. A. HITCHCOCK, *Secretary*.

MINING CLAIM—APPLICATION—CORPORATION—NOTICE—ADVERSE CLAIM.

HOLMAN *v.* CENTRAL MONTANA MINES COMPANY.

The mining laws do not require that the notice of an application for patent to a mining claim by a corporation shall designate the State or Territory under the laws of which the corporation was organized.

An adverse claim under section 2326 of the Revised Statutes is required to be filed "during the period of publication" of notice of the application for patent, and where the last day of such period falls on Sunday, an adverse claim filed on the following Monday can not be recognized by the land department as an adverse claim within the meaning of said section and can not have the effect to stay the patent proceedings upon the application.

Case of Ground Hog Lode *v.* Parole and Morning Star Lodes, 8 L. D., 430, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 17, 1906.* (G. J. H.)

December 1, 1903, the Central Montana Mines Company (hereinafter called the company) made application for patent for the Exchange and twenty-two other lode mining claims, surveys Nos. 7040 to 7062, inclusive, Lewiston, Montana, land district. With the application was filed a certified copy of the articles of incorporation of said company, showing that it was organized under the laws of the Territory of Arizona. Notice of the application was posted and published. Publication began on Wednesday, December 2, 1903, and on Monday, February 1, 1904, Alfred D. Holman filed an adverse claim against the application, alleging that he is the owner of the Banner lode claim, which conflicts with the Cliff, Hillside, Moshner and Extra lode claims, embraced in the application. Within thirty days from the filing of the adverse claim Holman instituted suit in the district court, tenth judicial district, State of Montana, against the Central Montana Mines Company of *West Virginia*. It appears that there were two corporations bearing the name "Central Montana Mines Company" doing business in the State of Montana and having their articles of incorporation on file in the office of the recorder for the county in which the claims in question are situated, one organized under the laws of the State of West Virginia, and the other, the applicant for patent herein, organized, as hereinbefore stated, under the laws of the Territory of Arizona, and that Holman, in ignorance of the fact that there were two corporations bearing the same name, finding from an examination of the county records in the recorder's office that there was a Central Montana Mines Company of *West Virginia*, and believing the same to be the applicant for patent, instituted suit against that corporation, as above stated. Subsequently learning that the proper party had not been named as defendant in such proceeding, Holman attempted to cure the defect by filing an amended bill of complaint in which the Arizona corporation was named as defendant. The court refused to allow such amendment, on the ground that it would in effect be the substitution of a new party defendant and the institution of a new suit, which, in view of the fact that the thirty-day period fixed by statute within which proceedings in court upon adverse claims may be commenced had then expired, it was held could not be permitted. Holman thereupon appealed to the supreme court of the State, which on November 23, 1904, dismissed the appeal.

April 30, 1904, Holman filed in the local office a petition praying that the company be required to republish notice of its application for patent, contending to support the same, in substance and effect, that the notice as originally published was insufficient, in that it did

not show under the laws of what State the company was incorporated, and that by reason thereof he was misled, resulting in the institution of proceedings in court against the wrong party. May 11, 1904, the local officers overruled the petition; from which action Holman appealed to your office, which, December 31, 1904, sustained the action below. Holman has further appealed to this Department.

The only question directly presented by the appeal is as to the sufficiency of the notice of the application for patent. It is, however, contended by appellant that the dismissal by the supreme court of the State of the appeal from the action of the lower court refusing to allow the amendment of the bill of complaint in the proceeding instituted by him in attempted compliance with the requirements of the statute, as hereinbefore set forth, was not a final determination of that proceeding and that the land department should take no further action in this matter until such proceeding is finally disposed of.

There is in the record a certificate by the clerk of the district court, tenth judicial district, State of Montana, in and for Fergus county, being the county in which the mining claims in question are situated, dated March 3, 1904 (which is subsequent to the expiration of thirty days from the filing of the adverse claim by Holman), to the effect that no suit of any character was ever instituted in said court against the Central Montana Mines Company, a corporation organized under the laws of the Territory of Arizona. A certificate by the clerk of the circuit court of the United States for the ninth circuit, district of Montana, dated March 7, 1904, to the effect that there is no suit or action of any character pending in that court in which the company is a party, is also with the record.

It is clear from the foregoing recital that, so far as appears from the record, no proper proceeding in court was instituted by Holman upon his adverse claim within the period of thirty days fixed by the statute. The rulings of the courts in the action brought by him were upon matters solely within their cognizance, with which the land department has nothing to do. The dismissal of the appeal by the supreme court of the State, as hereinbefore set forth, would seem to be a final determination of such action; but whether it be or not is wholly immaterial. It is not shown that a proceeding such as contemplated by section 2326 of the Revised Statutes, involving the conflicting claims of Holman and the company to the lands in question, is now pending in any court, and the period of thirty days within which such proceeding might have been commenced under the statute having long since expired, it is obvious that Holman can not be recognized as an adverse claimant within the meaning of the statute. His status before the land department in this proceeding is merely

that of a protestant charging insufficiency of notice of the company's application for patent.

Section 2325 of the Revised Statutes provides, among other things, that a corporation may make application for patent to a mining claim. Section 2321 provides that:

Proof of citizenship under this chapter may consist in the case of a corporation organized under the laws of the United States or any State or Territory thereof by the filing of a certified copy of their charter or certificate of incorporation.

Paragraph 44 of the mining regulations approved June 24, 1899 (28 L. D., 594, 601), in force at the time the application for patent in question was filed, requires, among other things, that the notice posted upon the claim shall give the "name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat of survey." Paragraph 51 of said regulations requires, among other things, that the published notice "must embrace all the data given in the notice posted upon the claim."

There is nothing in the mining laws or the regulations of the land department requiring the published notice of an application for patent by a corporation to designate the State or Territory under the laws of which the corporation was organized. It was held by the Department in the case of Hallett and Hamburg Lodes (27 L. D., 104, 108)—

It is believed to be the intent of the statute that the notice of application for patent, both posted and published, should contain such matter as will inform a man of ordinary intelligence and prudence having an interest in a mining location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim and thus assert and protect his rights as provided by section 2326, Revised Statutes.

The notice in the present case was sufficient to convey information to Holman that the company's application embraced ground claimed by him, and gave him an opportunity to assert and protect his rights to the ground in conflict, and it is immaterial that it did not show under the laws of what State or Territory the company was incorporated. Had he made inquiry at the local office, where the certified copy of the articles of incorporation was on file in compliance with the requirement of the statute, he could readily have ascertained the citizenship of the company. That he did not do so, and as a consequence instituted his proceeding in court against the wrong party, is not sufficient reason to warrant an order by the land department directing republication of the notice, in view of the fact that it is not shown that the notice as published fails to conform to the provisions

of the statute and the requirements of the regulations. He must suffer the consequences of his own neglect.

This disposes of the question raised by the appeal, but there is yet another question presented by the record, not discussed or passed upon in your office decision appealed from, namely: Was Holman's adverse claim in time, in view of the fact that the sixtieth day following the date upon which publication of the notice commenced fell on Sunday and his adverse claim was not filed until the following Monday?

Section 2325 of the Revised Statutes provides, among other things, that—

The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim. . . . If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre; and that no adverse claim exists.

The statute declares that the notice shall be published for a period of sixty days. No exclusion is made of Sundays or holidays. At the expiration of the sixtieth day, whether it fall on Sunday or any other day of the week, the period of publication is at an end. The only adverse claim which authorizes a stay of proceedings, and upon which suit may be brought under the provisions of section 2326 of the Revised Statutes, is "an adverse claim filed during the period of publication"—that is, during the period of sixty days. An adverse claim filed after the sixtieth day is not filed within the period of publication, as required by the statute, and can have no effect to stay the patent proceedings with a view to the institution of suit. With the very first moment of the sixty-first day following the commencement of the publication of notice, the statutory assumption arises that no adverse claim exists. The land department has no authority to extend the period of publication beyond the sixty days fixed by statute, or to recognize an adverse claim filed after such period has come to an end. In the case of *Gross et al. v. Hughes et al.* (29 L. D., 467, 469), the Department held:

The provisions of sections 2325 and 2326 of the Revised Statutes limiting the time within which an adverse claim may be filed to the close of the period of publication are mandatory, the former section, indeed, providing that if no such claim shall have been filed in the local office at the expiration of that period, it shall be assumed that none exists. The land department is without authority to extend that period to include a single additional day.

The case of *Ground Hog Lode v. Parole and Morning Star Lodes* (8 L. D., 430), not being in harmony with that case or the views herein expressed, is hereby overruled.

Your office decision is affirmed.

HOMESTEAD ENTRY—ADDITIONAL—KINKAID ACT.

GREEN PIGGOTT.

Where one entitled to make an additional entry under the act of April 28, 1904, exercises his right for a less amount of land than he is entitled to enter, and at the time of making such entry announces his intention to amend his additional entry to include other lands desired by him, sufficient to aggregate the quantity to which he is entitled under the act, as soon as he succeeds in clearing the records of other claims to such additional lands, and takes prompt action to that end, he may be permitted to amend his entry in accordance with such purpose when the additional lands desired by him become subject to entry, provided the rule as to compactness be observed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 17, 1906.* (E. O. P.)

Green Piggott has appealed to the Department from your office decision of August 14, 1905, rejecting his application to amend a former homestead entry made October 20, 1904, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 27 N., R. 11 W., O'Neill land district, Nebraska, so as to include therein the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 27, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, in the same township and range.

The record discloses that Piggott's original entry for the SW. $\frac{1}{4}$, Sec. 34 T. 27 N., R. 11 W., was made September 23, 1903, and form the basis for his claimed right to make entry of the land embraced in his rejected application as additional thereto, under the second section of the act of April 28, 1904 (33 Stat., 547). He was therefore clearly entitled to make his said entry of October 20, 1904, for the 160 acres entered by him, and might have, had he so desired, made entry for 320 acres more at the same time. It appears also that at the time he made his second entry, he did not intend to exhaust the right which he was entitled to exercise under the terms of the act of April 28, 1904, *supra*, but expected to exercise the same to its full extent by entering the lands now covered by his amended application, which lands were then covered by existing entries, the cancellation of which he was endeavoring to secure by contests initiated on the same date his second entry was allowed. While it has generally been held that a homestead right is exhausted by one entry, though for a less quantity of lands than is allowed by law, exception has been made where at the time the original entry was made for less than the full amount allowed, the claimant clearly disclosed his intention to amend his application to include additional land, when he had cleared the record of existing entries covering it. (Joseph Heisel, 26 L. D., 69; Daniel L. Hartley, *ib.*, 663, 665.) In the recent departmental decision in the case of *Walter O. Graves v. Henry E. McDonald*, decided March 28, 1906 (34 L. D., 527), involving the question of an amendment similar

to the one here presented, the rule announced by the earlier departmental decisions cited was adhered to and the amendment allowed.

Where there is no evidence in the record to show the fixed intention to amend, existing *at the time the original application* is filed, the right has been denied, notwithstanding the applicant subsequently made affidavit that such was his original intention. (James W. Luton, 34 L. D., 468.) An intent formed subsequent to the filing of the original application forms no ground for amendment thereof.

The doctrine of amendment is a purely equitable one and can not be insisted upon as a matter of abstract right, and while the doctrine is liberally applied, the prevailing equities to support it must be clearly established. Amendment has been allowed where, through ignorance or misinformation, an entryman, acting in good faith, has been misled to his prejudice. (Josiah Cox, 27 L. D., 389; Charles Carson, 32 L. D., 176.) In none of the cases where amendment has been allowed was there any valid intervening adverse claim and no legal objection to the allowance of the application other than that the entryman had previously exhausted his right of entry.

The doctrine being equitable, its application necessarily rests upon the facts and circumstances surrounding each particular case, and the Department is unwilling to attempt to establish a hard and fast rule by which the allowance or rejection of applications to amend shall be determined.

In the case at bar it appears from your office decision that there is an additional objection to the allowance of said application, to the effect that the lands embraced therein are not "as nearly compact in form as possible," as required by the terms of the statute, and it was for this reason the application was rejected.

Piggott in his affidavit filed with his application which he now asks to amend expressly declared that—

I reserve the right to amend this entry to include NE. SE., E. $\frac{1}{2}$ NE., SW. NE., Sec. 34, and E. $\frac{1}{2}$ NE. & E. $\frac{1}{2}$ SE. of Sec. 27, all in Tp. 27, R. 11, this day contested by me.

His application clearly disclosing his intention to later claim the tracts included in his amended application, was received by the local officers and the entry for 160 acres allowed.

It might have been competent for the local officers, treating the application as a conditional one, to have rejected it because of the condition and reservation therein, and their acceptance of the same conferred no right upon the entryman and established no contract between him and the government, executory or potential, as they are entirely without any contractual authority in the premises. Whilst the right to make the second additional entry was not inherent in, or

otherwise possessed by, the entryman, so that his declaration to the effect that "I reserve the right" etc., was without force for that purpose, as a party can not reserve a right he does not possess, yet that declaration, made under oath, is of great value as showing his present intention and desire to enter the described tract, and when followed so promptly by his contests shows such good faith in his purpose and conviction of his right as to entitle him to most favorable consideration and to justify the Department, for the purposes of the case, to treat the second application as complementary of the first, or the two as one transaction.

With regard to your rejection of the proposed entry because of its want of compactness, it is to be observed that whilst it reaches, it does not exceed, the maximum length of two miles fixed by the statute. No sufficient reason, however, is shown why it should be allowed in its present non-compact form, as you state there is other vacant contiguous land. If, however, there are no such lands which may be entered by him, the present application should be allowed as presented.

The decision appealed from is, for the reasons stated, hereby modified and returned for appropriate action.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RAILWAY COMPANY.

Where a tract of land falling within the Northern Pacific land grant and not excepted therefrom was sold by the company prior to January 1, 1898, and the purchaser thereafter, because of the erroneous decision of the land department holding said land to have been excepted from the railroad grant, sought to supplement his title by purchase of the lands from the United States under the provisions of section 5 of the act of March 3, 1887, these facts alone do not present such conflicting claims to the land on January 1, 1898, between the purchaser and the company, as are subject to adjustment under the act of July 1, 1898.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, April 24, 1906.* (F. W. C.)

Your office letter of the 13th instant submits for departmental consideration the question as to whether the conflicting claims to the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 1, T. 22 N., R. 4 E., Seattle land district, Washington, are subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The tract in question is within the primary limits of the Northern Pacific land-grant along its Cascade branch line and opposite the

portion thereof definitely located March 26, 1884. From the presentation made with regard to this tract in your said office letter, it seems that upon the contest of one John T. Hunter this tract was erroneously held to have been excepted from the Northern Pacific land-grant, it having been freed from all claims at the date of the definite location of the company's road, as above stated. Because of such decision one Jeremiah Dwyer, who held this tract under warranty deed from the company, dated October 26, 1880, made application to purchase the land under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556). Upon said application a hearing was ordered between Dwyer and Hunter which resulted in a decision in favor of Dwyer, who was permitted to complete claim to the land under his application to purchase on November 19, 1897, upon which purchase the patent of the United States was issued.

In letter of July 10, 1905, resident counsel for the Northern Pacific Railway Company requested the adjustment of the conflicting claims to this land under the provisions of the act of 1898, and it is upon this application that the matter is submitted to the Department for consideration, attention being called to departmental decision of November 17, 1904 (unreported), in the matter of the case of the Northern Pacific Railway Co. *v.* Victor E. Cline, involving lands in the Bozeman land district, Montana.

It may be stated first that in the case of Northern Pacific Ry. Co. *v.* Biggs *et al.* (31 L. D., 254), in considering the question as to whether a purchaser of lands within the Northern Pacific land-grant, under the provisions of section 5, act of March 3, 1887, has such a conflicting or adverse claim as is subject to adjustment under the act of July 1, 1898, *supra*, it was said, at page 256:

The claims of these purchasers under the act of 1887 do not meet the conditions above described. It is clear that the purchasers do not claim adversely to the railroad grant. It is true that they have sought to perfect title to these lands through the United States, but it is only because of their claim under the railroad grant that, upon failure of the railroad title, the act of 1887 affords them upon certain conditions, a right to purchase the lands of the United States. Further, these claims can not be held to have been initiated prior to January 1, 1898, for it was not held until long after that date that these lands did not pass under the railroad grant, and an application to make purchase under section five of the act of 1887 can not be entertained until it has been finally determined that the land sought to be purchased is in fact excepted from the grant. Nicholas Cochems (11 L. D., 629).

In the Cline case it was said:

Your office decision rests upon the decision of the Department in the case of Northern Pacific Railway Co. *v.* Biggs *et al.* (31 L. D., 254), the material points of difference, however, between that case and the one now under con-

sideration are these: In the case under consideration it is shown that at the time of the erroneous decision of this Department canceling the railroad listing, to wit, April 17, 1897, Cline was in possession of the land under a contract of purchase with the company on account of which several payments had been made. Following said decision, however, he seems to have repudiated his contract with the company and looked to the United States for title, and that since the issuance of patent of the United States the company has brought suit in ejectment which suit is still pending.

It thus appears that on January 1, 1898, Cline was in possession of this land claiming adversely to the company and under a purchase made directly from the United States. In the Biggs case the land involved was not held to have been excepted from the railroad grant until September 16 and October 5, 1898, subsequently to the passage of the act of July 1, 1898, and, as said in the decision of the Department in that case, "these claims can not be held to have been initiated prior to January 1, 1898, for it was not held until long after that date that these lands did not pass under the railroad grant, and an application to make purchase under section 5 of the act of 1887 can not be entertained until it has been finally determined that the land sought to be purchased is in fact excepted from the grant."

Upon the record made in this case it is the opinion of this Department that it is necessary to invoke the adjustment provided for in the act of 1898 for the protection of Cline, who, as before stated, had purchased this land directly from the United States prior to January 1, 1898. Your office decision is therefore reversed and the papers in the case are herewith returned for the adjustment of the conflicting claims in accordance with this decision.

In the present case, upon the record now before the Department it appears that the Northern Pacific Railway Company had no claim to this land on January 1, 1898, nor has it had any claim since it passed its title to Dwyer October 26, 1880. As it is admitted the decision of this Department holding that the tract included in Dwyer's purchase was excepted from the grant was erroneous, the title to the land in reality passed to the company and by its deed to Dwyer who still holds that title supplemented by the purchase from the United States. Said purchase having been erroneously allowed, it may be that upon proper application he could recover his purchase money and would still be fully protected through his purchase from the railway company. If it were shown that Dwyer had recovered his purchase money, paid to the railway company for its title, or the relation between himself and the company been otherwise changed prior to January 1, 1898, a different condition would be presented.

On this record the Department must hold that there does not appear to be such adverse conflicting claims to this land on January 1, 1898, as are subject to adjustment under the act of July 1, 1898. The company's request must therefore be denied and you will advise it accordingly.

FOREST RESERVE—LIEU SELECTION—ACTS OF JUNE 4, 1897, AND MARCH 3, 1905.

ROBERT LESLIE.

A selection under the provisions of the act of June 4, 1897, for a less area than embraced in the relinquished land offered as a base, not the result of mischance or misprision on the part of the local officers, is a waiver of the excess; and there is nothing in the act of March 3, 1905, repealing the act of June 4, 1897, authorizing the selector to make a further selection based upon such excess area.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, April 24, 1906.* (J. R. W.)

Robert Leslie appealed from your decision of August 18, 1905, rejecting his selection, not serially numbered, under the act of June 4, 1897 (30 Stat., 36), for lot 8, Sec. 6, T. 21 N., R. 29 W., 17.22 acres, Missoula, Montana, to satisfy the excess of land relinquished to the United States in a forest reserve, which had been assigned as base for selection 11,710, your office series, under the act of 1897, made at Denver, Colorado, for a smaller area than that relinquished.

By deed recorded May 7, 1904, Leslie and wife relinquished to the United States certain tracts having the aggregate area of 133.26 acres, in the Lincoln forest reserve, New Mexico, and, September 13, 1904, at Denver, Colorado, he selected in lieu thereof certain tracts aggregating 120 acres. Your office May 15, 1905, called attention of the local office to the excess of base, and directed the local office to notify the selector that he "will be required to file a waiver of his right to make a further selection in lieu of the said excess base." August 1, 1905, the Missoula local office transmitted an application, filed there by Leslie, to select lot 8, Sec. 6, T. 21 N., R. 29 W., M. M., 17.22 acres, in lieu of the above-mentioned 13.26 acres excess, referring to selection 11,710 for the deed of relinquishment and abstract of title to the base assigned, and tendering to pay for the 3.96 acres excess of the tract so selected. Your decision rejected the latter application, because (1) instructions of March 6, 1900 (29 L. D., 578), required selection of a tract of equal area, and relinquishment of the excess was therefore implied; (2) the act of March 3, 1905 (33 Stat., 1264), repealed the act of June 4, 1897, and no right of further selection exists; (3) that the selection attempted was presented at a different local office contrary to the rules and regulations of your office, and to good administration and orderly conduct of public business. The appeal contends (1) that no waiver of excess was implied; (2) the waiver of excess or selection to fill the base is at selector's option; (3) there was a pending selection and the right is saved by the proviso of

the act of March 3, 1905, *supra*; (4) the original and additional selection need not be made at the same local office.

These contentions are evidently founded upon a misconception of the act of June 4, 1897, upon the theory that it gave to one relinquishing land to the United States a right substantially like that given to Valentine by the act of April 5, 1872, as compensation for a wrongful disposal by the United States of lands belonging to him under a perfect grant of the former government, which, like that of similar character, under section 11, act of June 22, 1860 (12 Stat., 85), if located upon irregular subdivisions, is not satisfied, for the law promised an equal area as compensation for a wrong done, with no other limitation than location by entire subdivisions. Frederick W. McReynolds (31 L. D., 259).

No wrong had been done, and no taking of the land without the owner's consent in this class of cases. By the act of June 4, 1897, the United States merely offered to the owner an exchange, limited, however, by the condition that area should control, and he could select only an equal area, not more, upon a claim of greater value of that relinquished. The full equal area was his privilege, but the proposal was of an exchange. The nature of the contract of exchange is that equivalence of value is imported. No debt arises from one party to the other by any implication. The Department in its first construction of the act so defined it and refused to approve relinquishments or accept titles tendered unaccompanied by selection of lieu land in exchange. F. A. Hyde (28 L. D., 284); Opinion (28 L. D., 472); William S. Tevis (29 L. D., 575).

There was, however, an earlier erroneous practice in the local offices, and this the instructions of March 6, 1900, were intended to correct. Where partial selections had been erroneously received, the selector was permitted to perfect and fill his selection. This was because the land department was participant in the irregular proceeding and had not warned the selector.

There is also another distinctive class arising out of accident and mistake when a selector, through ignorance and mischance, intending to make exchange by full equivalent areas, includes in his selection lands not subject to his attempted appropriation. In such case the facts in themselves negative intent to select a less area than was his right, and show that he did not intend to exchange otherwise than by equal area. In such case remedy for mistake is justly due him, and he is permitted to fill what by mere mischance proved to be a partial selection and to hold as much of what he first selected as was subject to his appropriation. Frederick W. Kehl, July 9, 1903, unreported; William A. Orser (33 L. D., 352); Aztec Land and Cattle Company (34 L. D., 122); Cronan *v.* West (34 L. D., 301).

In the present case neither misprision of the local office nor mischance contributed to make Leslie's selection deficient to the area of the base assigned. The instructions of March 6, 1900, had been promulgated and in force for over four years, and he was conclusively presumed to know the established construction of the law. He can not be heard to assert that he did not intend to satisfy the base assigned by him in that transaction, for that is the necessary implication of the contract of exchange, which no intent or act then declared or manifested, afterward defeated by mischance, in any way negatived. This disposes of the first and second contentions, and your decision was the only proper one to be made, unless, as contended, the act of March 3, 1905, gave him a right to make a further selection for the base already assigned in the former one.

That act, except in specified cases, repealed the act of 1897. Three exceptions were made as to which classes of cases the repeal was not to operate: (1) contracts for exchanges made prior thereto by the Secretary of the Interior; (2) selections initiated prior thereto might be perfected; (3) new selections might be made for bases theretofore assigned in selections held invalid for any reason not the party's fault. It is not claimed that there was any prior contract with the Secretary; the only selection initiated and pending was the one at Denver. The statute was plainly not intended to give new rights of selection, but to terminate all rights of selection, saving those excepted, because attempted in good faith to be exercised. The Denver pending selection was imperfect in but one formal respect, that the selector had not complied literally with the regulations of March 6, 1900, in that he did not expressly state in writing the intent to waive the excess which was necessarily implied by his conduct in presenting it. He can not claim that he was misled by the action of the local office in not requiring the filing of an express written waiver, for the deficiency of area did not result from conflict with a prior right unknown to him. It appeared from his own act on the face of his application. If he did not intend to waive the excess, he confesses to an intent not to comply with the regulation and that his Denver selection must be rejected as a partial and incomplete one, rejected for his own fault, putting himself outside the proviso and not protected by the statute.

This effectually disposes of the 4th assignment of error, for, as he had no right, nor any equitable claim, to make an additional selection, it is immaterial whether an additional selection may or may not be made at another office than that at which the original partial one was made.

Your decision is affirmed.

TIMBER AND STONE ACT—SPECULATIVE ENTRY.

GRANVILLE M. BOYER.

An agreement or contract entered into by a timber and stone entryman, prior to final proof and the issuance of certificate, for the sale of the timber on the land, is in violation of the provisions of the act of June 3, 1878, against the speculative entry of timber lands for the benefit of another.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, April 24, 1906.* (P. E. W.)

October 11, 1902, Granville M. Boyer made timber and stone sworn statement for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 29, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20, T. 32 S., R. 65 W., Pueblo, Colorado, and on August 20, 1903, he made cash entry, No. 8844, for said land. Upon adverse report by a special agent of your office said entry was suspended February 29, 1904. A hearing was had on June 15, 1904, and thereupon the local officers recommended that the entry be relieved from suspension.

June 23, 1905, your office held the entry for cancellation, on the ground that it was made under a collusive agreement for the sale of the timber before final proof and in violation of law.

Boyer has appealed to the Department.

This case was consolidated, for trial purposes, with the similar cases of Frank Stites, Amos F. Hollenbeck and Carl J. Kaapcke, involving contiguous lands under a like state of facts, the testimony submitted here to be considered in determining all four cases.

The essential facts shown by the evidence, as found by the local officers and accepted by your office, are as follows:

The lands involved were originally well timbered, but at date of entry fully one half of the timber had been removed by depredators; they are non-mineral, non-agricultural, broken, rocky, arid, and properly subject to timber and stone entry; they are fit only for grazing and for that purpose are not worth more than two cents an acre per annum.

One day before filing his declaratory statement, the applicant, Boyer, entered into a written agreement, and the applicants Stites, Hollenbeck and Kaapcke at about the same time made verbal agreements, with one Richard Kaapcke, the president of an incorporated lumber company, whereby the latter purchased "all the timber standing" on said lands at the rate of one dollar and fifty cents per thousand feet, the purchase money to be used in paying the government for the lands in each case; and the latter further agreed to loan to the applicant for five years, at ten per cent interest, all money required for the purchase of the land from the government over and above the amount realized from said sale of the timber thereon.

It was further provided in said agreements that—

It is distinctly understood between the parties hereto that this agreement does not convey any interest in the title to said land, but is intended only to dispose of timber growing thereon.

Pursuant to said agreement, and without waiting for final proof to be made for these lands, the said Richard Kaapeke, in December 1903, began cutting and removing timber therefrom, and at the time of the investigation by said special agent in March 1903, he had cut and removed nearly all the timber, the applicants ratifying such action and receiving payment for the timber according to the stated agreements.

The Department is of opinion that the said agreement in this case is such a violation of the act of June 3, 1878 (20 Stat., 89), as to call for the rejection of the proof offered by Boyer and the cancellation of his cash entry.

Under the said act the applicant must, in his sworn statement, declare—

that he does not apply to purchase the same on speculation but in good faith to appropriate it to his own use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself.

The said act further provides that in case of a false statement in the application, the applicant—

shall forfeit the money which he may have paid for said lands, and all right and title to the same.

While Boyer did not make any contract by which the title to this land should inure in whole or in part to any other person than himself, he did make this entry with money furnished him for that purpose by another and under a collusive agreement whereby such other obtained the substantial and practically the only benefit to be derived from said entry, namely the timber standing on the land. Not only was such an agreement made but it was consummated before the entry was in fact made and when the applicant received his certificate the land had been denuded of its timber and was of no benefit to him who is asking for title thereto for "his own use and benefit." Clearly this is but another of the many forms and devices under which it is sought to accomplish indirectly that which the statute declares shall not be done, the speculative entry for such land for another's benefit. The final proof required by the act in question must show that the applicant "does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit," yet the facts are that the "main use and benefit" of the land has previously, under cover of this filing, been appropriated

by another not only with this applicant's knowledge and consent, but upon his written agreement made prior to the filing of his sworn statement.

It cannot be claimed that the value of the land for which the applicant asks is in any appreciable proportion to the value of the timber which has been removed therefrom, and the conclusion is inevitable that this entry was speculative and not in good faith.

The entry will be canceled, your said decision being hereby affirmed.

RIGHT OF WAY FOR RAILROADS, CANALS, RESERVOIRS, ETC

REGULATIONS.

In accordance with the agreement made by and between the Department of the Interior and the Department of Agriculture, paragraph 2 of the circular of February 11, 1904 (32 L. D., 481), and paragraphs 3 and 66 of the circular of September 28, 1905 (34 L. D., 212), except the last clause in each relative to construction in advance of approval or specific permission, which will remain as at present, are hereby amended so as to read as follows:

Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.

This amendment applies to forest or timber-land reserves only, not to national parks.

W. A. RICHARDS, *Commissioner*.

Approved, April 25, 1906:

E. A. HITCHCOCK, *Secretary*.

MINING CLAIM—PATENT PROCEEDINGS—PROOF OF POSTING OF NOTICE.

MOJAVE MINING AND MILLING CO. *v.* KARMA MINING CO.

Section 2325 of the Revised Statutes requires that an applicant for patent under the mining laws shall file with his application an official plat of the claim or claims applied for, and shall post a copy of such plat, together with a notice of the application for patent, in a conspicuous place on the land embraced in the plat, previous to the filing of the application, "and shall file an affidavit of at least two persons that such notice has been duly posted." The words "such notice" have been uniformly construed by the land department to embrace both the plat and notice referred to. *Held*: That the requirement as to the affidavit is mandatory, and where such affidavit is not filed all proceedings upon the application for patent are without authority of law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 30. 1906.* (A. B. P.)

December 6, 1902, the Karma Mining Company filed application for patent to the Karma lode mining claim, survey No. 3957, Los Angeles, California. Notice of the application appears to have been published and posted for the required period and no adverse claim was filed.

November 18, and December 2, 1903, the Mojave Mining and Milling Company, claiming to be the owner of two lode mining claims in conflict with the Karma claim, filed its original and supplemental protests against the application for patent, alleging amongst other things, in substance, (1) that the applicant company failed and neglected to post a copy of the claim applied for, together with a notice of the application for patent, in a conspicuous place on the land embraced in the application, as required by law, and (2) that said company failed and neglected to file, at the time of filing the application for patent, or at any time, an affidavit of at least two persons that a copy of such plat had been posted on the claim previous to the filing of the application for patent.

In the view the Department takes of the case it is unnecessary to state the other matters charged in the protest.

Among the things required of an applicant for mineral patent by section 2325 of the Revised Statutes, are that he shall post a copy of the plat of his claim, together with a notice of his application for patent, in a conspicuous place on the claim previous to the filing of the application, and shall show the fact of posting by an affidavit of at least two persons. The posting is required to be done before the filing of the application for patent, and the affidavit showing the fact of posting is required to be filed before any proceedings may be had in the land office upon the application. When all precedent conditions have been met, the section provides that the register shall publish a notice of the application for patent, for the period of sixty days, in a newspaper to be by him designated as published nearest to the claim, and shall post such notice in his office for the same period; also, that if no adverse claim shall have been filed with the register and receiver at the expiration of the sixty days of publication, it shall be assumed, where all further requirements have been complied with, that the applicant is entitled to a patent, and that no adverse claim exists, and thereafter no objection to the issuance of a patent shall be heard from third parties except it be shown that the applicant has failed to comply with the terms of the statute.

The Mojave company did not file an adverse claim, but contends through its protests that the applicant company failed, in certain

stated particulars, to comply with the terms of the statute in its patent proceedings, and therefore is not entitled to a patent, or to the benefit of an assumption that no adverse claim exists. It is denied in the protests that the required statutory proof of posting was filed; also, that the plat and notice were in fact posted as required prior to the filing of the application for patent.

The terms of the statute are that an applicant for mineral patent shall file with his application a plat of his claim, or claims in common, made by or under the direction of the surveyor-general, showing accurately the boundaries of the claim or claims, etc., "and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted," etc.

The requirement as to posting specifically includes both plat and notice, and the affidavit is required to show that *such* notice has been duly posted. The words *such notice*, used in connection with the affidavit, were evidently intended to embrace the official plat as a part of the notice. Obviously the proof of the posting on the claim must have been intended to embrace all that was required to be posted. Such has been the construction by the land department ever since the general mining statute of May 10, 1872, was enacted. Paragraph 30 of the general regulations under the mining laws, issued June 10, 1872 (Copp's U. S. Mining Decisions, p. 270-282), provided as follows:

After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat, and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously on the claim, giving the date and place of such posting; a copy of the notice so posted to be attached to, and form a part of, said affidavit.

This regulation has continued unaltered to the present time. It appears as paragraph 40 of the last general mining regulations, issued July 26, 1901 (31 L. D., 474, 481).

Under the statute, thus uniformly construed from the beginning, it was incumbent upon the applicant here to file with the register and receiver an affidavit of at least two persons that a copy of the official plat of the claim applied for, together with a notice of the application for patent, had been posted in a conspicuous place on the land embraced in such plat previous to the filing of the application.

This was not done but there was filed an affidavit of two persons stating that each was present on a given date (which was prior to the filing of the application for patent) "when the notice of the intention of the Karma Mining Company to apply for a patent for

the Karma mine was posted in a conspicuous place upon said mining claim, to wit, upon Karma shaft-house, where the same could be easily seen and examined, a copy of the notice so conspicuously posted upon said Karma mine being attached hereto, and marked Exhibit 'A.' The affidavit contains no statement that the plat of the claim was posted, nor does it in any manner mention or refer to such plat. The ordinary and only reasonable interpretation of the affidavit as a whole is that it was not intended to embrace posting of the plat. The attached Exhibit "A," referred to as a copy of the notice stated to have been posted, purports to be a notice by the Karma Mining Company that it is about to make application to the United States for a patent for a certain mining claim known as the Karma mine, and to give a description by courses and distances of such claim. The description is preceded by the statement: "Said mining claim being designated in the field notes of survey and on the official diagram herewith posted, as Mineral Survey No. 3957, and more particularly described as follows:" This statement is not a part of the affidavit, and cannot be so construed. It is merely an unsworn statement in the posted notice, and is in no sense proof of what is stated.

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one against which the land department is without authority to grant relief. Until such affidavit is filed the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and there is therefore no assumption that the applicant company is entitled to a patent and that no adverse claim exists. Such being the state of the record, the patent proceedings must fall, and it is not material to inquire whether the plat and notice were in fact posted as required or not. The entry will be canceled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

This disposition of the case renders it unnecessary to consider any of the other questions suggested by the record.

The decision of your office is reversed.

DESERT LAND ENTRY—CITIZENSHIP.

PETTET *v.* McCORMICK.

A citizen of one State or Territory who goes to another State or Territory with the avowed intention to make his permanent home therein, and in his sworn application to make desert land entry declares himself to be a

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) April 30, 1906. (P. E. W.)

Upon a hearing the local officers rendered dissenting opinions, the register recommending the cancellation of the entry, the receiver recommending that the entry be held intact. May 20, 1905, your office affirmed the decision of the register and held the entry for cancellation.

There is no dispute as to the facts in the case. It appears that claimant went to New Mexico in April, 1904, in company with a brother who had previously located there, leaving his wife in Kentucky, with the understanding between them that if he found the country suitable for their future and permanent home, he would make entry for a tract of land and then return to Kentucky to close his affairs and remove his family.

The claimant testified that he spent the interval in disposing of his stuff, live stock and real estate, and returned with his family to

New Mexico and to this land about the first of September, that being the earliest possible date he could return without unnecessary sacrifice of his property.

On cross-examination the claimant testified that prior to making the entry he made up his mind "thoroughly" to become a citizen of said Territory and wrote his wife that they would move out there as soon as they could get there, and then made the affidavit of residence for filing in good faith.

The wife of claimant testified:

My husband and myself talked it over before he came out here in April and if he liked it out here when he came in April he would take up land and we would come out here and make it our home. When he came back, he came to sell and dispose of his property and to go back as quick as he could, so we came.

The two brothers of claimant who had previously located in New Mexico testified that while claimant was there in April and prior to this entry, they between them agreed upon and arranged for the disposing of property in Kentucky which they owned jointly and that claimant then stated to them that "he was going back there and sell out everything and bring his wife and child here to live."

B. N. Bell testified that claimant in April told him that "he was going back to straighten his affairs and bring his family here."

There is nothing in the record to contradict or impeach the testimony and the good faith of the claimant. The receiver found—

that the defendant came to New Mexico in April 1904, with the intention of taking up his residence in this territory in case he should find that the country suited him . . . being well pleased, he made up his mind and declared . . . his intention to return to Kentucky, settle up his business, bring his family here, and make their future home. With this object in view and for this purpose, he made entry . . . returned to Kentucky, closed up his business as far as possible . . . and came back to New Mexico with his wife and child in September, 1904.

As there is no evidence going to show bad faith on the part of the defendant, or that he made entry of this land for speculative purposes, I am of the opinion that his entry should not be canceled.

The register held:

It appears that the defendant was a resident of Kentucky at the time he made said D. L. E. No. 1462, and that he continued to reside in Kentucky until after he was served with notice of contest.

I am therefore of the opinion that said D. L. E. No. 1462, should be canceled.

It is clear that a change of residence was contemplated and agreed upon by claimant and his wife before he left Kentucky in April, 1904, subject only to his favorable impression of the country where his brother had already located. That conclusion had been reached and that purpose declared prior to and at the time when the entry in question was made. It will not be questioned that, had he remained in said Territory from that time forward and sent for his family to

join him his resident citizenship and his entry would be unassailable. If the entry is to be canceled, therefore, it must be for the reason that he again departed from said Territory. But he took his departure with the declared purpose of disposing of his effects and returning to this land with his family, and this purpose was carried into effect within the six months allowed after entry, under the general homestead law, for establishing residence on the land. Manifestly the Territory in which he was, which he had chosen for his permanent home, and which he left with the avowed purpose of returning thereto and remaining permanently therein, is to be regarded as the place of his residence and citizenship rather than the State which he left with the avowed purpose of seeking and making his home elsewhere, to which he returned for the sole purpose of disposing of his effects and removing his family therefrom, and where he ceased to exercise the voting privilege of a citizen by reason of his said announced purpose and procedure of removal.

It is true that at date of this entry he had not become a voting resident of that Territory. The proper distinction is to be drawn between the political residence to be acquired before voting, and the actual being and living in a State or Territory with the intention of making a permanent home therein. In this latter sense the Department is of opinion that the claimant was in position properly to make the affidavit required and that the entry must be held intact. Your said decision is therefore reversed.

DESERT LANDS—STATE SELECTION—ACT OF AUGUST 18, 1894.

STATE OF OREGON.

Directions given that a hearing be had for the purpose of determining the character of certain lands in the Burns land district, Oregon, alleged to be desert lands and selected by the State under the act of August 18, 1894.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 2, 1906.* (G. B. G.)

By departmental decision of August 5, 1904, the protest of the Pacific Live Stock Company against the application of the State of Oregon under the act of August 18, 1894 (28 Stat., 372, 422), for the segregation of 58,344.57 acres of public land in the Burns land district, Oregon, was dismissed, but because of a suggestion in said protest that some of the lands embraced in said list are non-desert in character, your office was directed to carefully consider that phase of the case from all available sources of information and "if in your judgment the great body of these lands are desert lands within the meaning of the act of August 18, 1894, *supra*, to resubmit, with your

recommendation upon this question, the State's map and tentative contract for my approval."

Your office communication of September 30, 1905, in response to said direction, finds from sundry *ex parte* affidavits executed by numerous persons, which have been filed with the record since it was considered by this Department, that of the lands involved 19,000 acres, or nearly one-third of the whole area, are permanently non-desert, suggests that the fact as to this can only be determined by a hearing ordered for that purpose, and asks to be advised "whether the remaining 39,000 acres, which are probably desert lands, constitute the great body of the land as contemplated in the instructions."

This Department has no hesitancy in saying that if there is any considerable body of the lands involved non-desert, the list in question as such can not be approved. But this question can not be tried on *ex parte* affidavits, and as the State does not admit the truth of the matters therein stated, I have to direct that your office order a hearing herein, at the district land office, Burns, Oregon, after thirty days' notice, by publication in a newspaper published nearest the land involved, the date of the hearing to be fixed beyond such reasonable time as will permit a thorough examination of said lands by a special agent to be detailed by your office for that purpose, who should be directed to appear at said hearing and testify as to the results of his investigation.

In view of reports of engineers of the United States reclamation service to the Director of the Geological Survey, and the recommendations of that officer to this Department upon the subject of available water supplies which strongly question the feasibility of the State's scheme for the reclamation of these lands, the State should be advised that it will be allowed to introduce at the hearing testimony upon this subject and also upon any other matter bearing upon the feasibility of its proposed scheme.

NANCY C. YAPLE.

Motion for review of departmental decision of December 19, 1905, 34 L. D., 311, denied by Secretary Hitchcock, May 2, 1906.

MINING CLAIM—APPLICATION FOR PATENT.

EXTRA LODE CLAIM.

Proceedings to secure a mineral patent by one without interest in, or control over, the lands applied for, are without authority of law and no rights can be acquired thereunder.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 4, 1906.* (G. N. B.)

By decision of December 29, 1903 (unreported), the Department directed that a hearing be had upon the protest of Fred R. Lewis against the application, filed May 15, 1902, by M. L. Jones, for patent to the Extra lode mining claim, survey No. 15,721, Leadville, Colorado, land district, to determine whether the tie line from a corner of the claim to a corner of the public land surveys described in the notice, together with the other data, correctly defines the position of the claim as located and staked upon the ground. The facts are stated in the above mentioned decision and need not be restated here.

The hearing was duly had, June 24, 1904, at which the parties appeared and submitted evidence. August 9, 1904, the local officers found, in substance and effect, that corner No. 1 of the Extra lode claim was tied to the north quarter corner of section 4, T. 10 S., R. 79 W., 6th P. M., which has been recognized for many years as the true position of the north quarter corner, and to which a number of claims are tied, and that the tie line and other data correctly define the claim as located and staked upon the ground. They recommended that the protest be dismissed. Upon appeal, your office, by decision of February 25, 1905, reversed the finding of the local officers, and held that the tie line from the claim to a corner of the public surveys as described in the notice is materially erroneous as to both course and distance, and stated, in effect, that if further proceedings for patent to the Extra lode claim as located were had, an amended survey correctly to show the course and distance of a line to connect a corner of the claim with a regularly established corner of the public surveys would be required, and that patent could not issue for the claim except upon republication and reposting of notice to describe the claim and tie line as shown in the amended survey. The application for patent was held for rejection on the further ground that the applicant was not the owner of the claim at the date the application was filed. Your office also held that Charles J. Moore, transferee of the applicant for patent, and who had applied to make entry of the claim, would not be permitted to do so because he is now, and was at the date he sought to make entry, a deputy mineral surveyor.

Moore has appealed to the Department.

The question first to be considered is: Was Jones the owner of the mining claim at the date he filed application for patent? If not, the patent proceedings must be vacated from the beginning. Proceedings instituted to secure mineral patent by one who is without interest in or control over the lands applied for are without statutory authority (South Carolina Lode and Other Claims, 29 L. D., 602, 604), and therefore ineffective for any purpose.

Paragraph 42 of the Mining Regulations (31 L. D., 474, 481), provides, amongst other things, that—

Where the applicant claims as sole locator and does not furnish an abstract of title, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.

Jones's application for patent was filed May 15, 1902. Under it he claims as sole locator, but did not furnish an abstract of title nor his affidavit as required by the above regulation.

August 22, 1902, Charles J. Moore, transferee of Jones, applied to make entry of the claim, and at the same time filed an abstract of title to the claim brought down to July 11, 1902. The abstract is certified by the county clerk and recorder of the county in which the mining claim is situated to be true and correct, and to set forth all transfers of the Extra mining location to or from the parties named in it as appears from the records of his office. The abstract recites that the certificate of the location of the claim made by Jones is dated January 24, 1902, and was filed for record January 25, 1902, and that Jones conveyed the claim to Moore by deed, upon consideration of one dollar, dated May 12, 1902, acknowledged May 13, 1902, and filed for record July 9, 1902. No other transfer of the claim is shown by the abstract.

It is contended by the appellant that under the statutes of Colorado deeds take effect as of the date they are recorded, and therefore the abstract shows that the title to the mining location was in Jones until July 9, 1902. Section 446 of Mills Annotated Statutes of Colorado is cited to support the contention. The section referred to provides that—

All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office and not before, such deeds, bonds, and agreements in writing shall take effect as to subsequent *bona fide* purchasers and incumbrances by mortgage, judgment or otherwise, not having notice thereof.

There is nothing in the statutes of Colorado which makes ineffective the transfer of a mining claim or other interest in real estate by deed as between the parties upon delivery without reference to its recordation. Deeds take effect from delivery, and the general presumption is that a deed was delivered at the time it bears date. It is, however, held by some authorities that the law does not presume delivery prior to acknowledgement. Devlin on Deeds, Vol. 1, Par. 265, and authorities there cited. Applying either rule in this case, the presumption is that the deed was delivered prior to the filing by Jones of his application for patent. There is nothing in the record to show that the deed was not delivered on its date or on the date it was acknowledged. On the face of the record it appears that when

Jones filed his application for patent he had no interest in or control over the mining claim, and the application must therefore be rejected. The rejection of the application operates to vacate all proceedings under it, thus leaving no further question raised by the appeal or suggested in the record that requires to be considered to effectually dispose of the case.

The decision of your office so far as it held the application for patent for rejection is affirmed.

The hearing had discloses that the only controversy is as to the true position of the north quarter-corner of the said section 4 to which corner No. 1 of the Extra lode mining claim was tied. With the evidence is a plat showing the Extra claim and a number of patented mining claims adjoining and in its vicinity. This plat is certified by the surveyor-general of Colorado. The certificate states that the position of the north quarter-corner of section 4, T. 10 S., R. 79 W., as shown by the plat, and to which the Extra claim was tied, is the original and true position of the north quarter-corner as shown by the records of his office. If the records of your office do not agree with those of the surveyor-general, as certified to by that officer, with respect to the location and position of the north quarter-corner in question, the surveyor-general should be directed to definitely fix the true position of the corner by proper survey on the ground, and the records of his office and of your office should be made to correspond therewith.

RIGHT OF WAY—RAILROAD—ACT OF MARCH 3, 1875.

SAN ANTONIO AND EASTERN RY. CO. *v.* NEW MEXICO MIDLAND RY. CO.

No rights can be initiated for the use or benefit of any railroad company under the provisions of section 1 of the act of March 3, 1875, prior to the organization of such company under the laws of a State or Territory.

Secretary Hitchcock to the Commissioner of the General Land Office, May 4, 1906. (F. L. C.) (G. B. G.)

This is the appeal of the San Antonio and Eastern Railway Company from your office decision of October 13, 1904, dismissing its protest against the approval of the application of the New Mexico Midland Railway Company under the act of March 3, 1875 (18 Stat., 482), for right of way over the public lands of the United States from San Antonio to Carthage, a distance of 8.76 miles.

The San Antonio and Eastern Railway Company has also pending an application for right of way over substantially the same ground, and its protest is based upon a claimed prior right to the line in dispute. The decision of your office is put upon the ground that the

application of the New Mexico Midland Railway Company is prior in point of time to that of the San Antonio and Eastern Railway Company, and holds, without regard to other considerations, that such priority of application creates priority of right. It is, however, suggested by your office that, aside from the conflict of claims, the San Antonio and Eastern Company's application could not, under the decisions of this Department, be approved, because of the fact that the engineer of that company, in his affidavit on the map and duplicate, states that its survey was commenced on June 9th and ended June 11, 1904; whereas the president of the company certifies that such survey was adopted by the board of directors of said company June 10, 1904.

This case was heard orally by the Assistant Attorney-General for this Department, and it developed thereat that it was the intention of the parties to secure a decision from this Department alone upon the protest of the San Antonio and Eastern Company against the application of the New Mexico Midland Company, without present consideration of protesting company's application on its merits. It was therefore suggested that it was the purpose of this Department to consider the whole case at once, and in this view of the case, both companies desiring to file some additional showing upon the regularity and sufficiency of the protesting company's application, aside from the main question of priority, the proceedings were informally suspended and the parties given time to make such showing. Since that time the San Antonio and Eastern Company has filed a satisfactory showing that its survey had in fact been completed in the field, and that the result of this survey, with partially completed map thereof, was submitted to the board of directors of that company, and was before such board at the time of its adoption, June 10, 1904. This, it is thought, disposes of the objection suggested by your office against the application of the San Antonio and Eastern Company, and inasmuch as there has not been filed since the hearing anything in support of the New Mexico Midland Company's tentative objections to the sufficiency of the San Antonio Company's application, although nearly six months have elapsed since said hearing, there would seem to be no objection to now considering these respective applications upon their merits, and the case apparently resolves itself into a question of priority of right.

The record discloses no special equities in favor of either of these applicants, it appearing to have been a race between them to secure a legal right in advance of construction to appropriate this way to the exclusion of the other, and it is quite probable that the haste shown by each was more because of a desire to exclude the other than from any immediate necessity for the utilization of the right. It

therefore remains to determine which occupies the better legal position.

The San Antonio Company was duly organized as a corporation under the laws of New Mexico upon the filing of its articles of incorporation with the Secretary of the Territory, June 8, 1904. The survey of its line on the ground was, as has been seen, made on the 9th and 10th of the same month, and on the 14th its application was filed in the local land office.

The New Mexico Midland Company was duly organized as a corporation under said laws upon the filing of its articles of incorporation with the Secretary of the Territory, June 11, 1904. It is shown that some party, or parties, made a survey of the line in question from June 9th to 11th, of the same month, which was before this company had a corporate existence. This line was afterward adopted by the New Mexico Midland Company and its application for the right of way in question was filed in the local land office June 13, 1904, which was the day before the filing made by the San Antonio Company.

Under the circumstances of this case, priority of application does not carry with it priority of right. This question was definitely settled by this Department in the similar case of the Phoenix and Eastern Railroad Company *v.* Arizona Eastern Railroad Company (33 L. D., 617), upon authority of a decision of the Supreme Court of the United States in the case of the Washington and Idaho Railroad Company *v.* Coeur d'Alene Railway Company (160 U. S., 77), that no rights can be initiated for the use or benefit of any railroad company under section 1 of the act of March 3, 1875, *supra*, prior to the organization of such company under the laws of a State or Territory. It appearing, therefore, that the survey upon which the New Mexico Midland Company relies was made before the incorporation of that company, it secured no right by the adoption of that survey as against the San Antonio and Eastern Company, which was in law the first upon the ground, and executed and adopted a survey of the route in question, followed immediately by the filing of its application in the local land office, with due proofs of that company's organization. As against this company the survey, made the basis of the New Mexico Midland Company's application, is as though it had never been made. *Washington and Idaho Railroad Company v. Coeur d'Alene Railway Company, supra.*

It results that your office decision must be, and the same is hereby, reversed. The application of the New Mexico Midland Company is rejected, subject to the final approval of the San Antonio and Eastern Company's map, which your office is directed to forward for such approval, unless objections appear other than such as are herein considered.

Since the preparation of this paper a brief has been filed on behalf of the New Mexico Midland Company, which has received due consideration.

MINING CLAIM—TOWNSITE—CHARACTER OF LAND.

BROPHY ET AL. *v.* O'HARE.

To sustain an application for mineral patent, as against persons alleging the land to be non-mineral, it must appear that mineral exists in the land in quantity and of value sufficient to subject it to disposal under the mining laws.

In determining whether an alleged mineral location is a "valid mining claim or possession" within the meaning of the general townsite laws and section 16 of the act of March 3, 1891, relating to townsite entries by incorporated towns and cities on the mineral lands of the United States, the question of the character of the land is a primary one; and if the mineral claimant has had ample time and opportunity to show by exploration and development whether valuable mineral deposits exist on the land, and has not done so, and has not in any manner established that the location embraces mineral land under the well-settled rules of determination in cases where the character of the land is directly in issue, his location can not be held to be a valid mining claim or possession within the meaning of the law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) May 4, 1906. (G. N. B.)

April 13, 1904, Martin O'Hare filed application for patent to the Mountain View lode mining claim, survey No. 1852, Phoenix (formerly Tucson), Arizona, land district. June 26, 1904, W. H. Brophy and eight other persons filed a joint corroborated protest, in which, amongst other things, it is alleged, in substance and effect, that the land embraced in the mining claim is within the townsite of Bisbee, Arizona; that the protestants are residents of Bisbee; that the mineral applicant has failed to discover any vein, lode or deposit of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits as required by the mining laws; that he has failed to expend \$500 in labor and improvements on the claim; and that the application for patent is not made in good faith to acquire the land as a mining claim, but to secure title thereto because of its value for building purposes, and also to secure title to valuable improvements on the land by the protestants.

A hearing on the protest was ordered by the local officers, and had October 26, 1904, at which the parties appeared and submitted evidence. On that day John S. Taylor, mayor of the incorporated town of Bisbee, presented his corroborated protest against the mineral application, which protest contains substantially the same allegations as made in that of Brophy *et al.* This protest was received by the

local officers, but, so far as shown by the record, no action was taken thereon by them.

It is shown by the record, that March 8, 1904, the mayor of the town of Bisbee filed townsite declaratory statement, embracing, with other lands, the land here involved; that entry thereof was duly allowed, October 17, 1904; that April 10, 1905, O'Hare filed his protest against the issuance of patent upon the townsite entry, in so far as it conflicts with the land embraced in his mineral application, on the alleged ground that prior to the townsite entry the land had been segregated from the public domain by such application; that April 27, 1905, your office dismissed the protest on the stated ground that the issuance of townsite patent would not injuriously affect any rights that O'Hare might have acquired under his application for patent, or otherwise under the mining laws; and that upon appeal the Department by decision of July 25, 1905 (unreported), affirmed the decision of your office.

April 26, 1905, the local officers, after an exhaustive review of the evidence submitted at the hearing on the protest of Brophy *et al.*, found that the mineral applicant had failed to discover mineral on his claim of quantity and value sufficient to entitle him to patent under the mining laws, and that he had failed to make improvements or to perform labor to the value of \$500 on the claim. They recommended that the application for patent be rejected. Upon appeal, your office, by decision of November 20, 1905, considering the protest by the mayor of the town of Bisbee as properly to be disposed of under the hearing had, held, amongst other things, in substance, that the protestants have failed to show affirmatively that the land embraced in the mineral application is not mineral in character, and have failed also to show that the improvements placed on the claim fall short of the statutory requirement of \$500 in value. The finding of the local officers was reversed and the protests were held for dismissal.

Brophy *et al.* and the mayor of the town of Bisbee have filed separate appeals to the Department.

The mineral applicant has made a motion to dismiss the appeal by Brophy *et al.* on the ground that the protestants are without interest in the premises, and therefore have no right of appeal. The evidence shows that eight of the nine protestants claim lots covering portions of the land embraced in the mineral application within the townsite of Bisbee, and each of them owns one or more dwelling houses on the land, and at least three of them have been residing on the land continuously since sometime prior to the filing of the application for mineral patent. It thus appears that the protestants are asserting an interest in the land involved, and have therefore the right of appeal. The motion to dismiss the appeal is denied.

The mineral applicant contends that his mining location was valid when made, that the required annual expenditures have been made thereon since, and that for these reasons he is entitled to a patent for his claim as against the protestants. The question presented is not one simply of the validity of the location when made, or of possession thereof by means of annual expenditures. The applicant is asking for patent to the land, and the protest alleges a failure by him to make any discovery of mineral thereon as required by the mining laws. This raises the question of the character of the land. To sustain the application for mineral patent, as against persons alleging the land to be non-mineral, it must appear that mineral exists in the land in quantity and of value sufficient to subject it to disposal under the mining laws. In other words, the land applied for must be shown to contain valuable deposits of mineral, which means more than a mere discovery that might be sufficient to support a location in the first instance.

It is provided by the general townsite act (Sec. 2392, R. S.), and by section 16 of the act of March 3, 1891 (26 Stat., 1095), relating to townsite entries by incorporated towns and cities on the mineral lands of the United States, amongst other exceptions from such entries, that no title shall be acquired thereunder to any valid mining claim or possession held under existing law. In construing these provisions of the statute the Department has held that a townsite patent issued under the general townsite laws, or under the provisions of said section 16 of the act of March 16, 1891, is inoperative to convey title to any valid mining claim or possession held under the mining laws at the date of the townsite entry. *Lalande et al v. Townsite of Saltese* (32 L. D., 211); *Hulings v. Ward Townsite* (29 L. D., 21). The provisions of the statute are cited and relied on in the brief of counsel for the mineral applicant. The contention is that the applicant has a valid mining claim and possession within the meaning of the law, and that the same is therefore excepted from the townsite entry.

In determining whether the claim here involved is a valid mining claim or possession, the question of the character of the land raised by the proceedings is a primary one. If the applicant has had ample time and opportunity to show by exploration and development whether valuable mineral deposits exist on the land, and has not done so, and has not in any manner established that the location embraces mineral land under the well-settled rules of determination in cases where the character of the land is directly in issue, his location can not be held to be a valid mining claim or possession within the meaning of the law. *Purtle v. Steffee* (31 L. D., 400, 402).

It is in view of these principles that the evidence adduced at the hearing must be considered.

The evidence shows that the mining claim was located January 1, 1895, nearly ten years prior to the hearing, but no systematic work for the purpose of developing the land as a mining claim has been done thereon. No mineral of value has ever been secured from the claim, or from lands adjoining or in the immediate vicinity. At no time since the location of the claim has there been more than very slight indications of mineral veins or deposits therein. The evidence in behalf of the mineral claimant, not considering that of the protestants, fails to show that the land contains mineral in such quantity and of such value as to justify expenditures for its extraction, nor does it warrant the belief that further expenditures would disclose the presence of valuable deposits of mineral. Under such circumstances the land must be held to be non-mineral in character, and not subject to disposal under the mining laws.

This being determined, the question of the value of the improvements, and other questions suggested by the mineral claimant's counsel in a written argument, and by the record, need not be considered.

This disposition of the case also renders it unnecessary to give separate consideration to the appeal by the mayor of the town of Bisbee.

The decision of your office is reversed.

SCHOOL LANDS—NEW MEXICO—FOREST RESERVE.

TERRITORY OF NEW MEXICO.

Where the title to school sections has vested in the Territory of New Mexico under the grant made by the act of June 21, 1898, and such sections are subsequently embraced within a reservation created by executive order, the Territory may, under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, waive its right thereto and select other lands in lieu thereof.

Assistant Attorney-General Campbell to the Secretary of the Interior,
May 9, 1906. (G. B. G.).

By your reference of the 23d instant I am asked for opinion whether the Territory of New Mexico may relinquish to the United States section 36, township 16 south, range 13 west, N. M. P. M., within the Gila River forest reserve, granted to the Territory by the act of June 21, 1898 (30. Stat., 484), and select other lands in lieu thereof.

This matter arose upon a communication from the Forester of the Department of Agriculture to the Governor of New Mexico request-

ing that no stock be allowed on said section, because of the fact that a forest nursery had been established at Fort Bayard, on portions of the Fort Bayard military reservation, it being thought that such use of said section would be destructive to the nursery.

The Governor of New Mexico responding to this communication, after consultation with the Commissioner of Public Lands for the Territory, suggested that it was the desire of the territorial authorities to aid the forestry service in every reasonable way; but that said section had been leased for a term of years ending some time in the year 1907, and that under territorial laws the Commissioner of Public Lands would not be authorized to reject a proper proposal for the renewal of the lease. It was further said that the authority of the Territory to relinquish said section and take other lands in lieu thereof involves legal questions that should be carefully considered. Moreover, the Governor suggested that inasmuch as under the rulings of this Department lands taken in lieu thereof must be selected within the same township, no desirable exchange could be made so long as this ruling obtained.

The question submitted therefore involves two propositions—first, whether the exchange can legally be made, and, second, if it can be legally made, and the consent of the territorial authorities secured, whether the fact that it has been leased would prevent the exchange.

The first question has been repeatedly determined by this Department in the affirmative. See *State of California*, on review (28 L. D., 57); *Territory of New Mexico* (29 L. D., 364); *Id.* (29 L. D., 399). The two later cases involved the grant here in question, and it was therein specifically held that where the title to school sections has vested in said Territory under said grant and such sections are subsequently embraced within a reservation created by executive order, the Territory may under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, waive its right to such sections and select other lands in lieu thereof.

It is noted that the circuit court of the United States for the southern district of California, in the case of *Hibberd v. Slack* (84 Fed. Rep., 571), has held that the act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes, does not contemplate an exchange of lands between a State and the United States, but only indemnity for loss to a State by reason of lands to which it is entitled being disposed of by the United States. Said decision is not binding upon this Department, and will not be followed.

The question of whether an exchange could not be made without the consent of the lessee is one upon which I am not able to render an opinion upon the record. This question would in my judgment depend upon the terms of the lease—a copy of which is not with the papers or in the files of this Department. There would seem to

be, however, no immediate necessity for passing upon this question, as other objections to the exchange suggested by the territorial authorities make it altogether improbable that the Territory will consent thereto in the present state of legislation. Your attention is, however, called to the fact that there is now pending before the Congress of the United States House Bill 11940, the purpose of which is to place the Territory of New Mexico upon the same footing as other States and Territories in the matter of selection of school indemnity lands under the act of February 28, 1891 (26 Stat., 796). Should this bill become a law, it is probable that there will be no difficulty in securing a relinquishment of this section of land to the United States, and I think no further action should be taken pending such legislation. I suggest, however, the territorial authorities should be advised, in event of the failure of such proposed legislation, that inasmuch as it would not be possible for the Territory to make a lieu land selection within the township where such section sixteen is situated, the entire township being within the reserve, this Department will, because of the exigencies of the case, consider any selection that may be proffered for an exchange.

Approved:

E. A. HITCHCOCK, *Secretary*.

RULES TO BE OBSERVED IN PASSING ON FINAL PROOFS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *May 9, 1906.*

Circular of July 17, 1889 (9 L. D., 123), is hereby revoked and the following rules substituted therefor, viz:

1. Final proofs in all cases where the same are required by the general land laws or regulations of the Department, must be taken in accordance with the published notice; provided, however, that such testimony may be taken within ten days following the time advertised in cases where accident or unavoidable delays have prevented the applicant or his witnesses from making such proof on the day specified. Section 7 of the act of March 2, 1889 (25 Stat., 854).

2. Where final proof or any part thereof has not been taken on the day advertised, or within ten days thereafter under the exceptions and as required in Rule 1, you will direct new advertisement to be made; and if no protest or objection is then filed the proof theretofore submitted, if in compliance with the law in other respects, may be accepted.

3. If the testimony of either claimant or witness is taken at a different place than that advertised the Commissioner may, if in his opinion same is required, cause new advertisement for the proof to be taken at such place as he may deem advisable, or if in his opinion new advertisement is unnecessary, and no protest or objection has been filed, the proof theretofore submitted, if regular in all other respects, may be accepted without further testimony.

4. When a witness not named in the advertisement is substituted for an advertised witness, unless two of the advertised witnesses testify, require new advertisement of the names of the witnesses who do testify at such time and place as you may direct; and if no protest or objection is then filed, the proof theretofore submitted, if satisfactory in all other respects, may be accepted.

5. Where final proof is taken before an officer not named in the advertisement, it may be accepted if otherwise sufficient, provided the proof is taken at the time and place designated in the printed notice, or within ten days thereafter under the exceptions provided in Rule 1; and provided further, that both the officer advertised to take such proof and the officer taking same shall officially certify that no protest was at any time filed before him against the claimant's entry.

6. Evidence of declaration of intention to become a citizen of the United States or other evidence necessary to establish citizenship of foreign-born applicants should be received only when under the hand and seal of the proper officer of the court in which such papers appear of record. However, where it is shown that the judicial record has been lost or destroyed, proof of citizenship in such cases may be established under the rules governing the introduction of secondary evidence.

7. When proof is made before the register or receiver and the final certificate does not bear the date of proof, the register must indorse on the back of the final certificate of entry, at the time of its issuance, a brief statement of the reason for the delay in issuance of final papers, the indorsement to be in each instance signed by the register. If the delay was caused by failure of applicant to tender the money or other consideration at the time of making proof, additional evidence must be furnished showing that the claimant had not, at date of certificate, transferred the land, which evidence may consist of his affidavit taken before some officer authorized to administer oaths. In cases where it appears that the delay in issuance of final papers was not the fault of the claimant, the proofs being otherwise regular, the Commissioner of the General Land Office may in his discretion pass same to patent.

8. When proof is made before any officer other than the register or receiver a reasonable time will be allowed for the transmission of papers to the local office, and if a longer interval is shown between

date of proof and date of certificate, if the proof is otherwise sufficient and the record contains no reason for the delay, the register will indorse upon the back of the final certificate the statement required by Rule 7; and if such delay was the fault of the claimant, require the additional evidence prescribed by Rule 7.

9. Where final proof has been accepted by the local officers prior to promulgation of this circular, if in other respects satisfactory except that the register and receiver have failed to submit an explanation as to delay in issuance of final papers as required by Rule 7, the Commissioner of the General Land Office may, if in his opinion the facts and circumstances so warrant, pass the cases to patent in the absence of other objection.

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

FOREST RESERVE—LIEU SELECTION—UNSURVEYED LAND—ACT OF
MARCH 3, 1905.

GARY B. PEAVEY.

Where prior to the repeal of the exchange provisions of the act of June 4, 1897, by the act of March 3, 1905, selection was made and approved for unsurveyed lands described in terms of legal subdivisions of the public surveys, and upon survey some of the subdivisions were shown to be fractional and to contain a less area than contemplated by the selection, the selector may, under the saving provisions of the act of March 3, 1905, make additional selection to cover such deficiency.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 12, 1906.* (C. J. G.)

An appeal has been filed by Gary B. Peavey from the decision of your office of January 26, 1906, requiring him to waive his right to excess in area of land offered as base for his selection, No. 2687, made under the exchange provisions of the act of June 4, 1897, (30 Stat., 36).

June 2, 1900, Peavey filed application to select under said act the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 5, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 19, T. 25 N., R. 2 W., W. M., then unsurveyed, Seattle, Washington, in lieu of lots 9, 10, 11, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 27 N., R. 12 W., W. M., containing 142.20 acres, relinquished to the United States in the Olympic forest reserve. The records of your office show that 16.58 acres of the base lands above described were tendered as base for selection No. 3053, covering lot 12, Sec. 6, T. 36 N., R. 6 E., W. M., same land district, which was patented July 23, 1904, leaving 125.62 acres as base for the present

selection, No. 2687. Said selection, which was described as containing 120 acres, was approved by your office as for unsurveyed land July 28, 1903, and the official plat of survey of township 25 north was filed in the local office September 21, 1905, showing said township to be fractional. Thereupon Peavey applied to have his selection adjusted to the plat of survey, setting forth that said plat shows the lands embraced in his selection to be more correctly described as lot 2, Sec. 5, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 8, Sec. 19, T. 25 N., R. 2 W., and that the lands last described are the same as covered by his original application. In the decision appealed from your office stated and held:

The plat of survey of said township was filed in your office September 21, 1905, and the records of this office show that the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 5, is designated as lot 2, area 29.68 acres, and the E. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 19, is designated as the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, area 40 acres, and lot 8, area 41.85 acres, total area 111.53 acres, accordingly, the selection is so adjusted and you will note the fact on your records.

The area of the base land being 14.09 acres in excess of that selected, you will require the selector to waive his right to such excess, giving him sixty days in which to comply, or to appeal, in default of which the selection will be rejected.

It is urged in the appeal, among other things, "there was nothing to guide the selector in this case as to the probable amount that would be shown in the survey to be subsequently filed;" that "it can not be said that due diligence was not exercised in the attempt to adjust the base lands to the selection in order to equalize the area."

The forest lieu law of 1897 was repealed by the act of March 3, 1905 (33 Stat., 1264), the proviso thereto, which is the part material here, being as follows:

That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patent issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

The application of Peavey was made prior to said act and described legal subdivisions which if not fractional would contain the quantity of land applied for by him, namely, 120 acres. That quantity does not equal the right remaining to him under his assignment of base lands, which is 125.62 acres, and while it is a reasonable implication that he elected to take the tract applied for in full satisfaction of said right, yet it does not necessarily follow that he intended to also waive the excess in case the tract upon survey should be found to contain less than 120 acres. No error can be attributed to the government for accepting the application of Peavey for a less quantity than that relinquished, the same being for an unsurveyed tract which upon survey might be shown to contain more or less than the quantity esti-

mated by him. It is also true that he had no means of knowing what the exact area would be upon survey. Under such circumstances the justifiable course would be to afford the selector an opportunity either to fill his selection or waive his right to the excess. This would have been the selector's privilege and the proper course to pursue prior to the repealing act of March 3, 1905. It is believed said act invests the Department with discretionary powers in a case like this, as it is provided therein that selections theretofore made "may be perfected and patents issue therefor the same as though this act had not been passed." The phrase "may be perfected" fairly includes such selections pending at the date of the act as might properly have been completed prior to its passage.

The decision of your office herein is accordingly modified, and Peavey will be afforded a reasonable time, to be fixed by your office, in which to make additional selection to cover the excess in question, or waive his right to the same.

EMPLOYEE OF GENERAL LAND OFFICE—SECTION 452, REVISED STATUTES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 12, 1906.

*To all Officers, Clerks, and Employees of the
United States who are in any way connected
with enforcement of the Public Land Laws:*

1. Your attention is called to section 452, United States Revised Statutes, which reads as follows:

The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office. (See 11 L. D., 348.)

In construing this statute the Department has held (10 L. D., 97) that its provisions—

extend to officers, clerks, and employees in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

2. Acting under the spirit of this law and the decisions referred to, this office will recommend the removal or dismissal of any of the above-named officers, clerks, or employees who shall, either for themselves or others, in any manner negotiate for, buy, sell, or locate, any warrant, scrip, lieu land selection, soldiers' additional right, or any

other negotiable right or claim under which an interest in public lands may be asserted, as well as such officers, clerks, or employees who shall, except in the discharge of an official duty, help or in any manner whatever aid or assist in any such negotiations, purchases, sales, or locations as may be made by others for speculative purposes, or who shall in any manner whatever, except in the discharge of an official duty, furnish any information whatever to, or in any manner be in communication with, any person, firm, or corporation dealing in any such rights, in relation to such rights.

3. While section 452 of the Revised Statutes does not prohibit the acquisition of title to the public lands of the United States under appropriate laws by the wives of officers, clerks, and employees of the land department, it is not deemed advisable or proper in the interest of good administration that they should do so. Accordingly, such officers, clerks, and employees are advised that the application, entry, purchase, or acquisition of title, directly or indirectly, to any of the public lands by their wives, prior to the separation from the service of such officers, clerks, or employees, will be deemed a sufficient cause upon which to base a recommendation for removal or dismissal from the service of the officer, clerk, or employee whose wife acquires or seeks to acquire title to any of the public lands.

4. All of such officers who shall be in charge of and maintain offices are hereby directed to bring this circular to the attention of their subordinates, and to hereafter keep the same conspicuously posted in their respective offices.

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT.

ANDREW M. TURNER.

Where two military bounty land warrants are erroneously issued upon the same military service, both can not be recognized, and where in such case the warrantee, having both warrants in his possession, assigns one of them, he is estopped thereafter to assert the validity of the other, and an assignee of such invalid warrant has no higher legal right than the warrantee.

The cases of Andrew Anderson *et al.*, 1 L. D., 1, and L. C. Black, 3 L. D., 101, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 15, 1906.* (J. R. W.)

Andrew M. Turner appealed from your decision of October 9, 1905, refusing to return to him military bounty land warrant, No. 29118, issued May 31, 1856, under the act of March 3, 1855 (10 Stat., 701).

May 31, 1856, warrant 29118 issued to Joseph Chapman for service in Captain Wright's company, 46th regiment United States infantry, war of 1812. There is also a certificate that June 9, 1856, warrant 28014 had been issued to Joseph Chapman, a private in Captain Job Wright's company, 46th United States infantry—each for one hundred and sixty acres.

The latter warrant was not transmitted by your office with the record, though it is included in the schedule as: "A. Warrant No. 28014, 160 acres, act of 1842, and accompanying papers." The contents, however, of the enclosure "A." are, (1) a certificate of the Commissioner of Pensions of June 9, 1856, that such warrant "has been issued," upon this is an assignment of it, (2) to this is attached the local land office certificate of location of this warrant, but no warrant is attached, nor do these papers indicate that any other paper has ever been attached, nor is such warrant in the enclosure "A." or elsewhere in the record. Its presence, however, is not necessary to decision of the case.

The two warrants being thus erroneously issued for the same service, on June 20, 1856, Chapman assigned the certificate 28014 to John Z. Smith, and the papers purport that he, July 25, 1856, assigned 29118 to William R. Turner, of Gentry county, Missouri. The handwriting and ink of the body of the assignments are in each different from the assignees' names, which may have been left blank. Chapman's signature is by mark, with J. S. Warner as witness in both assignments, joined in 28014 by E. F. Smith, and in 29118 by William Morton. Both assignments were executed before C. M. Griswold, justice of the peace, Steuben county, New York.

Both warrants having been assigned, 29118 was located at Plattsburg, Missouri, February 28, 1857, upon the northwest fractional quarter and north half of the southwest quarter, section five, township sixty-five, range thirty-one, and November 11, 1858, the Commissioner of Pensions filed a caveat against issue of patent on this warrant, and the location was suspended. June 28, 1860, No. 28014 was located at Stevens Point, Wisconsin, on the SE. $\frac{1}{4}$, Sec. 26, T. 28, R. 10 E.

March 4, 1864, your office transmitted No. 29118 to the Commissioner of Pensions, for examination, and April 19, 1864, he advised you that reasonable suspicion still existed that the papers upon which No. 29118 issued were false and forged, and that it was necessary for Mr. Turner to establish by satisfactory proof the identity of the warrantee as the man who rendered the military service and executed the assignment, and, further, that if Mr. Turner failed to produce the requisite proof, "at his request the warrant will be canceled and returned to your office for his use in recovery of his purchase money."

May 14, 1864, your office directed the local office to notify Mr. Turner of suspension of his location, of the requirements of the Commissioner of Pensions, and that he might make substitution for the warrant. He made cash substitution June 8, 1865, which the local office reported. June 20, 1865, your office reported to the Commissioner of Pensions Mr. Turner's failure to furnish the required proof, and November 18, 1865, the Commissioner canceled warrant 29118 and returned it to your office, which transmitted it, November 28, 1865, to the local office for delivery to Mr. Turner for use in recovery of his purchase money. December 1, 1865, patent issued to Mr. Turner on his substituted cash entry. He never reclaimed the canceled warrant, and July 8, 1885, it was returned to your office, where it has since lain. March 8, 1904, Andrew M. Turner filed in your office a power of attorney to counsel to reclaim the warrant 29118, with affidavit of two witnesses that Andrew M. Turner died at Eureka, Kansas, February 22, 1870, and that claimant is his son, only descendant, and sole heir.

Your office held that a location of this warrant on public lands should not be allowed; that Chapman received all he was entitled to by issue and satisfaction of warrant 28014; that return of warrant 29118 would be merely to furnish a means to defraud some innocent party, and declined to return it.

Claimant alleges for error that:

It appearing . . . that said warrant was properly issued and was assigned in due form by the warrantee, and that the said warrant was wrongfully canceled . . . it is error to refuse to return the warrant to the owner of the same with a certificate from the Commissioner of the General Land Office, to the effect that the same is a valid warrant and will be recognized.

The record shows that this warrant was invalid when Chapman is claimed to have assigned it. He had but one claim, and when two evidences of that right were inadvertently issued to him, the right was not doubled, as it is not in the power of the Commissioner of Pensions to create, enlarge, or double the liability of the United States. In this respect the case is like that of C. L. Hood, this day decided, to which reference is made.

Also on this subject the Attorney-General (5 Op., 387, 389) held:

The power and authority of public officers are just what the law makes them. The law is the measure of their authority and their acts. The Commissioner of Pensions . . . had authority only to issue on each claim one warrant for the specified bounty; that was the limit of his lawful power. . . . In issuing more than one he has transcended his power, gone beyond the limits of his special authority and jurisdiction; and his acts, upon the clearest legal principles, are null and void. . . . The issuing more than one warrant on the same claim was what the Commissioner had no power or discretion under any state of the case to do. It was done, therefore, without law, and contrary to law. My strong conviction is, that, except the first one issued, all the other warrants that have been issued on the same claim are of no legal validity.

The Attorney-General here speaks of the first warrant as being the one to be regarded as valid. Granting for argument that both warrants were issued on one claim, and that both were duly assigned, another principle determines this case, modifying that rule. Had warrant 29118 been first assigned the rule stated would control. But Chapman had both warrants in his hands at the same time. He first assigned warrant 28014 to John-Z. Smith, June 20, and July 25, 1856, held no right, for the only obligation he ever held against the United States was then divested from him, and vested in his prior assignee. He and his assigns are estopped to say that warrant 28014 was not validly issued. When Andrew M. Turner's location was suspended, he was advised of the facts, and was given opportunity to show, if he could, that the papers on which his warrant 29118 was issued were not false and forged. At that time an issue might have been made between him and Smith as to which one held the valid warrant. Not attempting that, he substituted cash, and thereby in effect confessed the validity of warrant 28014 and the invalidity of 29118. Nothing in the record impugns Chapman's good faith in the prior assignment of June 20, 1856, but whether so or not, Turner had opportunity to take issue and to show validity of his assignment. He failed to do it. Credit is due this action of more than forty years ago. Turner and those claiming by succession are in no better place than Chapman would be were he now here a claimant. Chapman, after his assignment of June 20, 1856, would not be heard to claim return of warrant 29118 as valid. Bounty land warrants are not negotiable instruments, though assignable. The assignee takes only the right the assignor had, and stands in his place, subject to the same defenses as might have been then made against him. As Chapman, after his assignment of June 20, 1856, had no right, Turner obtained none by the later assignment.

There are decisions of the Department that seem to hold the contrary. No. 622, Lester's Land Laws, Vol. 1, p. 612, holds (syllabus) that "Two warrants being erroneously issued to the same party, though one be obtained by fraud, both must be respected;" (ib. 621, No. 636, syllabus) that, "Where a land warrant was erroneously issued for one hundred and twenty acres, and the claimant was only entitled to eighty acres, the warrant may be located by an assignee who is purchaser for consideration and without notice, for its full quantity;" (ib. 622, No. 637) that "Where both the original warrant and the duplicate are located, both must be satisfied, except in cases of forgery;" Andrew Anderson *et al.* (1 L. D., 1, syllabus): "The Commissioner of Pensions has no authority to cancel a military bounty land warrant in the hands of an innocent assignee;" L. C. Black (3 L. D., 101) to the same effect. The two decisions last

cited are based upon opinion of the Attorney-General of March 15, 1856 (7 Opin., 657), and departmental decisions in Lester, Nos. 636 and 637, *supra*.

It does not appear in the report in any of these cases that the valid and invalid warrants were both in the hands of the warrantee when his first assignment was made. It is sufficient for decision of this case that such was the fact. The warrantee, Chapman, was estopped by his assignment of warrant No. 28014 thereafter to assert validity of 29118. The paper is not negotiable and that estoppel concludes all privies under him claiming warrant 29118; so that the decisions above cited are not controlling or applicable.

But these former departmental decisions are unsound in principle in recognizing the United States as bound by misfeasance of its officers in acts not warranted or authorized by the law prescribing their duties. The Revised Statutes of the United States provides that:

Sec. 2414. All warrants for military bounty-lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same, which have been or may hereafter be made are hereby declared to be assignable . . . so as to vest the assignee with all the rights of the original owner of the warrant or location.

It is only warrants "issued under any law of the United States" that are assignable, and the assignee takes by the assignment merely "all the rights of the original owner." It is folly to contend that Chapman could himself have made location of both warrants and have demanded patent upon both. If he could not, his assignee, under this section, can not, for he takes only Chapman's right. When Chapman made the assignment of warrant 29118, he had no right. The decisions above cited, and any others to such effect, so far as they hold that the validity of a military bounty land warrant, after assignment, is not subject to inquiry, or must be recognized as valid, if issued in excess or violation of law granting such bounty, are hereby overruled. The opinion of the Attorney-General (7 Opin., 657), upon which such departmental decisions were founded, was examined, criticised, discredited, and the fallacy of its reasoning shown by Dillon, Circuit Judge, in *Bronson v. Kukuk* (3 Dill., 490, 494). The earlier opinion (5 Op., 387) appears to be the better reasoned.

Your decision is affirmed.

MILITARY BOUNTY LAND WARRANT-DUPLICATE.

C. L. Hood.

The issue of a duplicate military bounty land warrant under the provisions of the act of June 23, 1860 (now section 2441, Revised Statutes), in the belief

that the original has been lost or destroyed, creates no new liability or obligation on the part of the United States, where the original warrant had been located and satisfied prior to the issue of the duplicate.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 16, 1906.* (J. R. W.)

C. L. Hood appealed from your decision of July 3, 1905, rejecting his application for return of duplicate military bounty land warrant No. 19257, issued under the act of March 3, 1855 (10 Stat., 701).

The original, issued January 21, 1856, to George W. Mitchell for eighty acres, was assigned March 3, 1856, to Jesse Taylor, and June 7, 1856, was located at Decorah land office, Iowa, on the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 24, T. 95 N., R. 20 W., upon which patent issued to Taylor August 13, 1867.

August 9, 1895, the Commissioner of Pensions issued to Mitchell a duplicate, which he assigned August 21, 1858, to James Farasey, who located it at La Crosse land office, Wisconsin, January 20, 1859, upon the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 22, T. 15 N., R. 6 W. December 6, 1864, the Commissioner of Pensions canceled it and declared it void, February 6, 1886, the entryman was permitted to substitute cash for the warrant location, and patent issued for the land November 19, 1886. November 19, 1904, C. L. Hood appeared by attorney, alleging that through Farasey he became owner of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 22, and sold it by warranty deed, filing an abstract of title of the land showing such fact, after which he discovered that patent had not issued, and to make title good had to pay the United States \$100 in substitution for the canceled duplicate warrant, and asking return of the duplicate warrant. July 3, 1905, your office denied the application, and on Hood's motion for review adhered to that decision.

The evident theory and basis of the application is that the duplicate warrant is valid and may be located on public lands, although the original has been located and satisfied. The duplicate was issued under the act of June 23, 1860 (12 Stat., 90), now codified as section 2441 of the Revised Statutes, which provides:

Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty-land, has been lost or destroyed, whether the same has been sold and assigned by the warrants or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued, in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bounty-land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, re-issued, the original warrant, in whose hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

This statute authorizes issue of a duplicate warrant only when the original has been "lost or destroyed;" that the duplicate is to stand in place of the original, which is to be thenceforth deemed null and void, and any assignment of it fraudulent, and no patent shall be issued upon it, unless such presumption of fraud be removed by due affirmative proof that it was executed in good faith for value. It is evident from the statute that no power is given by issue of a duplicate warrant to create a new liability or a double liability where only one existed before. Had such power been given, the last clause, "unless such presumption of fraud in the assignment be removed," could have no purpose.

When the duplicate of this warrant was issued, the land warrant upon which it purported to issue no longer existed as an obligation of the United States. It had been duly located June 7, 1856, at Decorah, Iowa, more than two years before issue of the duplicate, and by appropriation of public land was satisfied. George W. Hendry (4 L. D., 172, 173). The case is in strict analogy to the unauthorized reissue of a debenture or warrant once paid and satisfied, concerning which Dillon (Municipal Corporations, 2d Ed., Sec. 409) says:

Payment by the treasurer or proper officer of a municipal corporation of its orders or warrants *ipso facto* extinguishes them. If lent, reissued, or put into circulation again by the officers after he has once obtained credit therefor, they are not valid securities, not even, it seems, in the hands of an innocent holder, citing *Canal Bank v. Supervisors*, 3 Denio, N. Y., 517; *Halstead v. Moyer*, 3 Comst., N. Y., 430; *Sweet v. Carver*, 16 Minn., 106.

The authorities are clear that a liability against the government can not be created by the mistake, misprision, or fraud of its officer acting without authority of law. It was held in *Robertson v. Sichel* (127 U. S., 507, 515), that:

The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which will be subversive of the public interests.

It was held in *Moffat v. United States* (112 U. S., 24, 31), that:

The government does not guarantee the integrity of its officers, nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but the servants of the law, and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it.

In *Whiteside v. United States* (93 U. S., 247, 257) it was held that:

Torts committed by an officer in the service of the United States do not render the government liable in an implied assumpsit, even though the acts done were apparently for the public benefit.

It was held in *Hart v. United States* (95 U. S., 316, 318) that:

A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect.

The mistake of the officers of the United States in issuing this duplicate warrant could not revive the obligation of the warrant then already satisfied by location of the original upon public lands. The obligation was thereby discharged and satisfied, and no authority of law existed for its reissue. While no actual fraud is shown leading up to issue of the duplicate, the case is strictly analogous in principle to that of *Marvin Hughitt* (33 L. D., 544). The issue of the duplicate being unauthorized, it is not and was never of any validity or evidence of any right of its holder. To surrender it would simply set afloat an instrument useful for no purpose but attempts to perpetrate fraud against interests of the United States in the public lands. Its return was therefore properly denied. It is impossible that Farasey took assignment of the duplicate without notice. The duplicate carried on its face conspicuously written in red ink "Duplicate," importing necessarily that it was not the original obligation, but merely a copy of it, the validity of the original obligation as continuing and unsatisfied being necessary to the validity of such copy substituted for it, and pointing to the conditions on which its validity and the power of the officer to issue it depended.

Your decision is affirmed.

SCHOOL LANDS—INDEMNITY SELECTION—INDIAN RESERVATION.

STATE OF CALIFORNIA.

Where a school section is embraced within the limits of an Indian reservation, the State may, under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, waive its right thereto and select other land in lieu thereof, notwithstanding such section was identified by survey prior to the establishment of the reservation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 22, 1906.* (F. W. C.)

The State of California has appealed from your office decision of January 9, 1906, holding for cancellation its indemnity school land

selection, filed at the Stockton land office, California, July 11, 1899, R. and R. No. 388, State No. 3236, for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 14, and fractional N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 18, T. 9, S., R. 7 E., M. D. M., in lieu of .82 acres deficit in Sec. 36, T. 5 N., R. 23 W., S. B. M., within a forest reserve, and the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 36, T. 15 S., R. 21 E., S. B. M., within the Yuma Indian Reservation, because of the fact that the title to Sec. 36, T. 15 S., R. 21 E., S. B. M., passed to the State prior to the executive order of January 9, 1884, creating the Yuma Indian Reservation, by the terms of which there were excepted from said order all tracts to which valid rights had attached. Said last-mentioned tract is therefore held not to constitute a valid base for an indemnity selection, the case of State of California (17 L. D., 71) being cited as authority.

In its appeal the State urges that the Department has already granted indemnity to the State in lieu of most of the school sections within the Yuma Indian Reservation, and that the State has also selected and received indemnity for sections 16 and 36 within other Indian reservations in California, and that the indemnity is permissible under the provisions of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes.

In the case of State of California, on review (28 L. D., 57), the matter at issue was the right of the State under the provisions of the act of February 28, 1891, to take indemnity in lieu of a section 36 within the boundaries of the Sierra Forest Reserve, established by executive order dated February 14, 1893. In said decision it was stated that the section was surveyed prior to the establishment of the reservation and that it was conceded that the State had full title to the tract in that section and that it was not therefore within the power of the Executive to reserve the same or in any way impair the State's right thereto. While it was therefore within the boundaries of the forest reservation, it was clearly not reserved. Nevertheless, the Department held that it was possible for the State to take indemnity under the act of February 28, 1891, referring to that part of the act which provides—

and other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections 16 or 36 are mineral land, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States.

The township in question, namely, township 15 south, range 21 east, S. B. M., was surveyed in 1856, the approved plat having been filed February 6, 1857. There is nothing suggested to defeat the State's claim, so that its title became complete upon the identification of the land by the filing of the township plat.

The order of January 9, 1884, creating the Yuma Indian Reservation, included section 36 of said township within the boundaries of

the reservation thereby created, but the order provides "that any tract or tracts included within the foregoing described townships, to which valid rights have attached, under the laws of the United States, are hereby excluded out of the reservation hereby made." So far as this tract is concerned, the effect would have been the same had there been no exclusion, so that the case is in all important particulars similar to that considered in departmental decision in 28 L. D., 57, before referred to, with the exception that there the lands were included within the boundaries of a forest reserve, while here they are included within the boundaries of an Indian reservation, both created by executive order.

Under this presentation of the matter no sufficient reason appears for permitting the selection in one case and denying it in the other. While the case reported in 17 L. D., 71, was not specifically referred to and overruled in the case last mentioned, the instructions of December 19, 1893 (17 L. D., 576), were modified accordingly. Those regulations provide by paragraph 4 "that selections upon the base of surveyed school sections within the said forest reservations will not be allowed under any circumstances," and there does not appear to have been any specific ruling of the Department warranting this paragraph of the regulations, except the case in 17 L. D., 71, hereinbefore referred to. Without, therefore, at this time, attempting to distinguish the case under consideration from that in 17 L. D., 71, it is believed, as before stated, that the case under consideration is controlled by the decision in 28 L. D., 57, hereinbefore mentioned, and in view of the previous adjustment of similar matters made by your office in apparent harmony with this decision, the case is remanded for your further consideration and disposition in accordance with the rule announced in the case reported in 28 L. D., 57, *supra*.

CONTESTANT-PREFERENCE RIGHT.

MICHAEL L. WEICHSSELBAUM.

A successful contestant is entitled to the full period of thirty days after the case is finally closed and no longer open to proceedings on review or appeal, within which to assert his preference right of entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 22, 1906.* (P. E. W.)

Michael L. Weichselbaum has appealed to the Department from your office decision of June 23, 1905, affirming that of the local officers

and rejecting his application to enter, under the act of June 3, 1878 (20 Stat., 89), the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 151 N., R. 26 W., Cass Lake, Minnesota.

Rejection was upon the ground of conflict with the prior application of Malcolm C. Barry, under section 2307 of the Revised Statutes, in the exercise of a preference right gained by successful contest of a previous entry.

The undisputed record facts are that Barry's contest case against the previous entry was closed, by decision of your office, on May 28, 1904; the annotation of cancellation of the previous entry was placed on the tract book of the local office on June 2, 1904; Weichselbaum filed his application to enter the land on June 6, 1904; registry letter notice of the cancellation of the previous entry and of his preference right to enter the land was mailed to Barry by the local officers on June 8, 1904; Barry received the notice on June 10, 1904, and filed his said application on July 12, thirty-two days after notice. His application was held to be seasonably filed and was allowed.

To the general rule that where notice is given by mail five days additional are allowed for its transmission and five days for a return thereon, Weichselbaum urges the objection, basing this appeal thereon, that it—

does not and cannot operate to extend the time in which to make application under a preference right; that the time is designated and stated in the act itself and cannot be extended.

The real matter of inquiry on the record herein, however, is not whether the said rule may extend the time granted by the act of May 14, 1880 (21 Stat., 140), for the exercise of a preference right of entry, but whether the allowed period of thirty days, properly set running, had terminated before the application of Barry, in the exercise of his preference right, was filed.

In the case of *Lawrence v. Seeger*, on review (25 L. D., 377), the Department said:

It is true that he was required under the law and regulations of the Department to assert his preference right within thirty days from notice of the cancellation of the contested entry. This he did not do. . . . He filed his application in less than thirty days after the motion for review had been disposed of, which, under the circumstances, is held to be in time.

A sufficient reason for such holding is found in the fact that the said motion for review might be sustained and thus the application to enter, under preference right, would be confronted with an existing entry. Clearly, the period of preference right cannot, by notice of cancellation of the former entry, be set running beyond control of the Department under subsequent developments, or to the impairment

or defeat of the contestant's right, and the statute must be construed to mean that the contestant shall have notice of the cancellation of the former entry and shall have a period of thirty days for filing, after the time for a review has passed or the right to review has been waived.

Thus in the case of *Kiehlbauch v. Simero* (32 L. D., 418) it was held that—

The period of thirty days accorded a successful contestant within which to exercise his preference right of entry does not begin to run until the case arising upon his contest is finally closed.

In that case the former entryman had relinquished on June 28, 1902, and thus waived any right of review, yet it was held that the preference right application, filed within thirty days after July 22, 1902, when the contest case was closed by your office, was seasonably filed, and this without regard to the date when notice was given the successful contestant. In the present case it is clear, from the stated dates and acts, that the notice to Barry of cancellation, and of his preference right, was premature, having been served during the time within which the former entryman might proceed in review or appeal, and it cannot be held to have set running the thirty days period to which Barry was entitled after all possibility was gone of further proceedings by said entryman.

In the case of *Kleven v. Lundrigan* (unreported), decided April 3, 1905, the Department, upon motion for review, recalled its previous affirmative decision and reversed the decision of your office wherein it was held that—

mistake due to any cause whatsoever could not add to the period during which his preference right subsisted, which right began on the day upon which he received the notice of the cancellation of Nelson's entry and of said preference right.

Said departmental decision was upon the ground that the successful contestant had been induced by a second and mistaken notice of his preference right to delay his application to enter beyond the period of thirty days from receipt of his first notice.

Following the said former decisions and the manifest reason and intent of the act in question to give the successful contestant a preference right for the full period of thirty days after his contest case is finally closed and on longer open to proceedings in review or on appeal, it must be held that Barry seasonably exercised his preference right and has the superior right to make entry for the land in conflict. Your office properly allowed Weichselbaum to so amend his application that the land applied for may be contiguous and that there may be no conflict with Barry's application.

Your said decision is affirmed.

REPAYMENT—ASSIGNEE—MORTGAGEE.

CANADIAN AND AMERICAN MORTGAGE AND TRUST COMPANY.

Repayment is not authorized under the provisions of the act of June 16, 1880, where entry is properly allowed on the proof presented, but is subsequently canceled upon a showing that such proof is false; and in this respect an assignee has no better right than the entryman.

An applicant for repayment of the purchase money paid on a commuted homestead entry, who claims the right to repayment as mortgagee under a mortgage executed prior to completion of the entry, is not an assignee within the meaning of the statute and is therefore not entitled to repayment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 23, 1906.* (C. J. G.)

An appeal has been filed by the Canadian and American Mortgage and Trust Company from the decision of your office of February 10, 1906, denying its application for repayment of the purchase money paid by Archie Alley upon making cash entry No. 7287, for the SE. $\frac{1}{4}$ of Sec. 20, T. 162 N., R. 44 W., Crookston, Minnesota.

Alley made homestead entry for the land described May 3, 1900, which he commuted to cash entry October 9, 1902, his final proof on its face showing compliance with law. A contest affidavit was filed by Hiram Crawford July 11, 1903, in which it was alleged that Alley never resided upon nor cultivated the land and that "his final proof was made in fraud and contrary to law." A hearing was had, notice having been personally served upon the entryman. Crawford and his witnesses appeared and submitted testimony but Alley made default. The local officers rendered decision recommending cancellation of the entry, which action your office affirmed upon appeal, finding that the testimony presented at the hearing showed that the statements made in Alley's final proof were false, and upon further appeal the decision of your office was affirmed by the Department.

The Canadian and American Mortgage and Trust Company is claiming as the assignee or mortgagee of Alley. The action of your office denying its application for repayment is based on the rule laid down in several cited decisions under the act of June 16, 1880 (21 Stat., 287), to the effect that where an entry is properly allowed on the proof presented but is subsequently canceled upon showing being made that said proof was false, then repayment is not authorized under said act; and that in this respect an assignee can have no better right than the entryman. Or, as set forth in the instructions governing repayments (30 L. D., 430, 435):

If a tract of land were submitted to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to

be false, it could not be held that the entry was "erroneously allowed;" and in such case repayment would not be authorized.

October 6, 1902, a loan of \$275 was made to Alley through the Fargo Loan Agency of Fargo, North Dakota, by the Canadian and American Mortgage and Trust Company, the company taking a mortgage on the land embraced in Alley's cash entry. The mortgage having been executed prior to the date of said entry, which was October 9, 1902, the mortgagee company is therefore not an assignee within the meaning of the repayment statute. The rule given in the instructions governing repayments, *supra*, is as follows:

Those persons are assignees, within the meaning of the statute authorizing the repayment of purchase money, who purchase the land after entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by law.

Hence, the cash entry of Alley not only did not fail of confirmation "for reasons contemplated by law," in which respect the company can occupy no better position than Alley, but as the transaction under which the company claims, even if it be regarded in the nature of an assignment, took place prior to the completion of said entry, the company is not an assignee within the meaning of the repayment act. As shown by an accompanying abstract, title to the land in question is now claimed to be in the Canadian and American Mortgage and Trust Company, and for the purposes of this application for repayment the company quit-claims said land to the United States. All the transactions set forth in said abstract, including the formal sale and deed of Alley, took place subsequently to the complete cancellation of Alley's entry. Such transactions can not be regarded as a consummation in the company of its mortgage transaction with Alley, said mortgage having been executed prior to the completion of Alley's entry. It follows therefore that title to the land has been in the United States since said cancellation, and that the purported conveyances set out in the abstract were void and are ineffective. Nor can it be justly claimed that the company is without laches or blame in the matter, since those who purchase or take assignments of land prior to the completion of the entry therefor do so at their own risk.

The decision of your office denying repayment herein is affirmed.

RAILROAD GRANT—SETTLEMENT—RED LAKE INDIAN LANDS.

CATHCART ET AL. *v.* MINNESOTA AND MANITOBA R. R. CO.

No rights were acquired by settlement upon lands within the ceded portion of the Red Lake Indian reservation prior to their opening to settlement and

entry, and where such settlement was entirely upon lands selected with the approval of the Secretary of the Interior prior to the opening, by the Minnesota and Manitoba Railroad Company, under its grant made by the act of April 17, 1900, of right of way and necessary lands for terminal facilities at the crossing of Rainy River, no entry can now be allowed of such lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 26, 1906.* (E. J. H.)

Lots 3 and 4 of Sec. 35, T. 161 N., R. 31 W., Crookston, Minnesota, land district, are a part of the lands in the Red Lake Indian Reservation, ceded to the United States under the provisions of the act of January 14, 1889 (25 Stat., 642), and were embraced in the schedule of lands approved by the Department on September 22, 1903, publication of which was made by circular of that date, and were opened to settlement and entry on November 10, 1903.

The status of said lands with respect to settlement and entry prior to the date of said opening, was defined in departmental circular of August 1, 1899, wherein it was stated that there had been no appraisal, order for sale or opening to settlement, or for the advertisement thereof, and all parties were warned not to make settlement thereon, and that no rights could be secured thereby.

By act of Congress of April 17, 1900 (31 Stat., 134), the right of way was granted to the Minnesota and Manitoba Railroad Company, fifty feet in width on each side of the center line of said railroad, through the ceded lands of said reservation to a point on Rainy River; also land adjacent to such right of way for station buildings, machine shops, side tracks, turn tables, water stations, and such other structures as it might deem to its interest to erect, not to exceed 300 feet in width and 3000 feet in length for each station, to the extent of one station for each ten miles of road, "except at the crossing of said Rainy River, at which point said railroad company may take not exceeding forty acres in addition to the grounds allowed for station purposes for the corresponding section of ten miles: *Provided*, That no part of such lands herein granted shall be used except in such manner and for such purposes only as are necessary for the construction, maintenance, and convenient operation of said railroad."

July 13, 1900, the railroad company, in accordance with the terms of said grant, filed in the local office a map showing the definite location of its line of road and station grounds selected by it at the Rainy River crossing, including all of lots 3 and 4 and a strip 140 feet in width along the entire west line of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 35, the same being based on a survey completed June 4, 1900. An amended map thereof was filed November 8, 1900, and December 5, 1900, the same was approved by the Secretary of the Interior, "subject to all the conditions, limitations and provisions of the act of Congress of

March 3, 1875 (18 Stat., 482), and the act of Congress of April 17, 1900 (31 Stat., 134), and subject also to all valid existing rights."

By the act of Congress of February 9, 1903 (32 Stat., 820), the general townsite laws were declared to be extended and applicable to any lands within said ceded Indian reservation.

November 4, 1903, prior to the opening of said lands to settlement and entry, as hereinbefore shown, upon the petition of certain parties claiming to be inhabitants of the village of Beaudette and engaged in business there, M. A. Spooner, Judge of the District Court of the 15th Judicial District of Minnesota, in which Beltrami county is situated, wherein the lands in controversy are located, filed in the local office, his declaratory statement to the effect that it was his intention to enter said lots 3 and 4 as a townsite, under the provisions of sections 2387, 2388 and 2389 of the Revised Statutes of the United States, for the use and benefit of the inhabitants of said village of Beaudette.

November 13, 1903, Thomas Cathcart tendered in said office his application to make homestead entry of said lots, together with the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said Sec. 35, T. 161 N., R. 31 W. His application was suspended pending the disposition of the townsite application, from which action he appealed.

January 21, 1904, your office issued notice of a hearing upon the townsite application and set April 5, 1904, therefor. Due service of said notice was made and on said date the parties all appeared. Cathcart filed a protest against the proposed entry of said lots 3 and 4 for townsite purposes. The railroad company also filed a protest against the allowance of the townsite application, claiming that by the approval to said company of its map of right of way and station grounds, it was the owner of said lands. The townsite claimants and Cathcart submitted testimony. Upon motion of the railroad company the case was continued for the purpose of taking the deposition of Hector Baxter, president of said company, which deposition was subsequently taken and filed September 15, 1904.

October 14, 1904, the local officers in their decision recited the testimony of said Baxter to the effect that on June 27, 1901, he paid to the United States the sum of \$1458.26, in payment for the right of way, station grounds, and additional land (lots 3 and 4) granted said company at Beaudette, this payment being made at the rate of \$1.25 per-acre, the sum at which the special agent of the government appraised said land; that it was and still is the intention of the company to use all of the land taken at Beaudette for terminal purposes, and that the company had never permitted the use of said land for other than railroad purposes.

It was found from the testimony of Cathcart and his witnesses, which was undisputed, that he was 73 years of age and made settle-

ment on the land in October, 1890; that he at once built a house and commenced to clear land; that in 1891 he moved his family upon the land and had ever since resided there; that he continued to make improvements until at the time of the hearing he had between 45 and 50 acres cleared, at a cost of \$90 to \$100 per acre, the land having been heavily timbered, a dwelling house 50 feet square with wings thereto, for which he had been offered \$4000, also barns, stables for stock, and numerous other buildings, all of his improvements being of the value of \$7000 to \$8000; that he took the land for a home, without expectation that a railroad would be built in there; that he made no protest against the same and had never made any agreement with the company regarding right of way, but had ordered off parties who were building on the land.

It was also found from the testimony submitted on behalf of the townsite claimants that the village of Beaudette was unincorporated and was not regularly divided into blocks and streets; that at the time of the hearing there were on the land six stores, five saloons, three hotels, a meat market, school house and church combined, newspaper office, feed store, barber shop, brewing company, warehouse, depot and freight shed, and other buildings numbering in all about thirty, some of which were substantial and others merely shanties, and that they were nearly all located within the railroad station grounds, which are 200 feet wide on each side of the track; that the inhabitants numbered, at the time of the filing of the townsite application, between 80 and 100, many of whom were holding homestead claims elsewhere.

It was held that the money paid by the company to the government was not a payment for the land taken as right of way and station grounds and the additional forty acres at Beaudette, but a payment made under section 2 of the act of April 17, 1900, *supra*, for "the amount of damages resulting to the tribe of Indians in their tribal capacity, by reason of the construction of said railroad through such ceded lands of the former Red Lake Indian Reservation," and therefore "that by the payment of this sum of money to the government, the title to the land did not pass from the government, but the lands were simply granted to the company for railroad purposes, and that a subsequent entryman or claimant could take the lands only subject to the right of the railroad company to use those lands for railroad purposes."

It was therefore recommended that the townsite application be rejected, that the protest of the railroad company be dismissed, and that Cathcart be permitted to make homestead entry of the lands applied for by him, subject to the rights of the railroad company for right of way and station grounds.

From so much of said decision as denied the right of townsite entry of said lots 3 and 4 of Sec. 35, T. 161 N., R. 31 W., Judge Spooner, on behalf of the Beaudette townsite applicants, appealed. The Minnesota and Manitoba Railroad Company also appealed from that portion of said decision which denied its absolute title and exclusive right of possession of all of said lots 3 and 4 under and by virtue of the provisions of the act of April 17, 1900, *supra*.

April 21, 1905, your office decision said, substantially, that whatever title was acquired by the Minnesota and Manitoba Railroad Company to the lands in question, under the act of April 17, 1900, *supra*, vested in said company on July 13, 1900, the date on which its map of definite location was filed; and that if the company on that date acquired such title or right to the lands as would entitle it to demand and enforce exclusive possession and use thereof, it necessarily followed that no rights thereto had been acquired by Cathcart or the townsite settlers, in view of the fact that settlement on said lands prior to November 10, 1903, had been expressly prohibited by departmental circular of August 11, 1899.

As to the character of said grant to the railroad company, the cases of New Mexico *v.* United States Trust Co. (172 U. S., 171), and Missouri, Kansas and Texas Ry. Co. *v.* Roberts (152 U. S., 114); and Melder *v.* White (28 L. D., 412), in each of which cases said question was in issue, were considered. As a result thereof it was found that "the Minnesota and Manitoba Railroad Company acquired and holds, by virtue of the grant made by Congress, a conditional fee in the lands covered by the approved map of the definite location of its right of way and station grounds at the Rainy River crossing, including all of lots 3 and 4, and 140 feet in width along the entire west line of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 35, T. 161 N., R. 31 W.;" and that such a fee, as well as a fee simple, leaves nothing in the United States which can be passed to another.

It was held that as the railroad company, on July 13, 1900, filed a map designating its right of way and station grounds, which had departmental approval on December 5, 1900, and had constructed its road, its title was superior to any rights which Cathcart might have by virtue of his extensive and valuable improvements and residence for many years on the land.

Regarding the townsite settlers, the most of whom, it was said, came upon the land subsequently to the completion of the railroad in 1900, or with notice of its intended construction, it was held that they must be conclusively presumed to have had knowledge of the company's right to the lands, and that there was not sufficient evidence to establish a meritorious townsite settlement prior to July 13, 1900, or for some time subsequent thereto.

From said decision Cathcart, and also Judge Spooner, acting as trustee for the townsite settlers, have appealed to the Department.

It is claimed on behalf of Cathcart that the grants in the cases cited by your office as having conveyed a base or qualified fee, differ materially from the grant made to the Southern Kansas Railway Company by the act of July 4, 1884 (23 Stat., 73), which was under consideration in the case of *Smith v. Townsend* (148 U. S., 490), wherein said grant was held to convey merely an easement; that the grant to the last-mentioned company contains a limitation upon the use of the land not found in the other grants named, to wit: "That no part of such lands herein granted shall be used except in such manner and for such purposes, only, as are necessary for the construction, maintenance and convenient operation of said railroad;" also that in said grant the right to amend or repeal is given without reservation, which is not the case in said other grants; that it was mainly these provisions in said act of 1884, which caused the court to hold that the grant made therein was a mere easement, and it is urged that as said provisions are contained in the act of 1900, making the grant in question to the Minnesota and Manitoba Company, which grant it is also claimed is very similar in terms to the grant of 1884, said grant of 1900 should be held to convey merely an easement and Cathcart be allowed to make entry subject to the rights of the railroad company for right of way and station grounds.

It should be noted that the grant in question to the railroad company was for right of way and station grounds, and *in addition* thereto forty acres at the Rainy River crossing. Lots 3 and 4 selected by the company at said point, under its grant of forty acres, contain 31.35 and 27.90 acres, respectively, or 59.25 acres in the aggregate. The right of way passes through said lots and the station grounds are mainly thereon. No claim is made that more than forty acres of said lots remain after allowing for said right of way and station grounds, so that no part of said tracts would be left to Cathcart under his homestead claim, unless he has the right to make entry thereof subject to the right of the railroad company under its grant.

In the case of *Northern Pacific Railroad Company v. Smith* (171 U. S., 260), the title to certain lots in the city of Bismarck was involved. Said lots were wholly within the right of way of 400 feet in width, granted to said railroad company by the act of July 2, 1864, and were claimed by the company thereunder. The road was constructed in 1873, the report of acceptance thereof approved by the President on December 1, 1873, and the company had maintained and operated said road ever since. Smith claimed title under deed of conveyance from the corporate authorities of the city of Bismarck, as part of a townsite plat patented to the mayor of said city on July 21, 1879. It was held that:

By granting a right of way 400 feet in width Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes, in the face of the grant and of the finding that the entire land in dispute was within 200 feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants.

The precise character of the business carried on by such tenants is not disclosed, but the court is permitted to presume that it is consistent with the public duties and purposes of the railroad company; and at any rate a forfeiture for mis-user could not be enforced in a private action.

In the case under consideration herein the lands were a part of the ceded Red Lake Indian Reservation and were not opened to settlement and entry until November 10, 1903. The railroad company had, on July 13, 1900, filed its map of definite location of right of way and station grounds, and showing the appropriation of all of lots 3 and 4. The road was constructed and the amount of damages resulting from the construction thereof paid long prior to the opening of the lands to settlement and entry. Cathcart secured no rights to the land by reason of his settlement prior to such opening, but it would seem that the railroad company's rights, under its grant, attached on July 13, 1900, the date of the filing of its map.

If it were held that, under the terms of the grant, the railroad company would be required to show that lots 3 and 4 were needed for terminal purposes, it would seem that the approval of the map of definite location of the right of way and station grounds, and selection of said lots, was an adjudication by the Secretary of the Interior that the same were needed for such purposes. And while it does not appear that said lots, outside of the right of way and station grounds, have as yet been used by the company in the construction, maintenance and operation of its road, testimony was submitted to the effect that it was and still is the intention of the company to use the same for terminal purposes.

If there was any part of lots 3 and 4 left to which Cathcart's right under this settlement could attach, after the appropriation by the railroad company for its right of way and station grounds and the forty acres to which it was entitled under its grant, he might be allowed to make entry of said lots subject to the company's rights to the portion claimed by it under its grant, but said company's rights appear to cover the entire lots.

In view of the situation in this case it would not seem to make any difference whether the grant in question to the railroad company be held to convey a base fee, or merely an easement. Under the decision of the court in the case of Northern Pacific Railroad Co. v. Smith, *supra*, until a forfeiture has been declared for mis-user or non-user,

said lots can not be entered by Cathcart, and such forfeiture "could not be enforced in a private action."

As to the townsite applicants, it appears that the rights of the railroad company under its grant attached on July 13, 1900, upon the filing of its map of definite location of right of way and station grounds and appropriation of lots 3 and 4, and that the road was constructed through said lands long prior to the passage of the act extending the townsite laws to lands within said reservation. Most of the townsite settlers came upon the land subsequently to the completion of the road or with the knowledge of its intended construction. It was held in the case of *Link v. Union Pacific Railroad company* (6 L. D., 322), that "the construction and operation of a railroad is sufficient to put subsequent settlers within the limits of the grant on inquiry as to the rights of the road, and parties claiming adversely thereto."

Moreover, it appears that the buildings of Cathcart and store building of J. M. Loughlin, who is not a townsite applicant, are the only ones built upon brick or stone foundations and really permanent in character. Those of the applicants are wholly within the limits of the station grounds, except four or five small shanties and stables which are outside and quite scattered. Several of the parties enumerated as such settlers appear to have been merely at work, or staying there for a short time, also quite a number were holding homestead entries and claiming residence on other lands in the vicinity.

The Department is of opinion that the evidence fails to establish the fact that there was a meritorious townsite settlement on the land prior to July 13, 1900, or prior to the completion and operation of the road.

Your office decision is accordingly affirmed. The townsite application is denied, and the homestead application of Cathcart rejected as to said lots 3 and 4.

UMATILLA INDIAN LANDS—ACTS OF MARCH 3, 1885, AND JULY 1, 1902—
PREFERENCE RIGHT—PROOF.

BURROUGHS *v.* CARROLL.

The act of July 1, 1902, supplementary to the act of March 3, 1885, relating to the disposition of lands in the Umatilla Indian reservation, accords to *bona fide* settlers a preference right to purchase the lands settled upon for the period of ninety days, and where during that period purchase is made by one claiming the preference right, but who in fact is not entitled thereto, the entry allowed thereon will not be canceled for invalidity on that ground alone, where there was no existing preference right in another to the lands at the time such entry was made.

No time is specified in the act of March 3, 1885, within which a purchaser thereunder must make the required proof of residence and cultivation, but it rests with the claimant when it shall be submitted, so long as it be within a reasonable time, and when submitted, the claimant, in the face of a contest charging failure to comply with the law in the matter of residence, must stand or fall upon the showing made, and will not be permitted, if the proof be insufficient or fraudulent, to cure the default.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 31, 1906.* (E. O. P.)

Rosa Carroll has appealed to the Department from your office decision of September 14, 1905, holding for cancellation her cash entry, made August 19, 1902, for lots 11, 12, 19 and 20, Sec. 7, T. 1 S., R. 33 E., untimbered lands, and the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 22, T. 1, R. 35 E., timbered lands, La Grande land district, Oregon, upon contest initiated against said entry by B. L. Burroughs. The entry in question was made under the provisions of the act of March 3, 1885 (23 Stat., 340), as amended by the act of July 1, 1902 (32 Stat., 730).

The affidavit of contest sets out as grounds for the cancellation of the entry:

That the said Rosa Carroll was not prior to the first day of July, 1902, or at any other time, a *bona fide* settler or resident on the above described tract of land or any part thereof, nor had she prior to said date, settled upon or lived upon said tract of land or any part thereof, as by law required, or at all.

That the said Rosa Carroll did not in any way comply with the act of Congress which was approved the first day of July, 1902, entitled an act to provide for the sale of the unsold portions of the Umatilla Indian Reservation, so that she might procure a preference right of ninety days from said date to purchase said land as a *bona fide* settler.

That the said Rosa Carroll did make application to purchase said tract of land under the preference right clause of said act of Congress.

That the said Rosa Carroll made, on the nineteenth day of August, 1902, and for a long time prior thereto had been, the lawful wife of William J. Carroll, and that while they were husband and wife, the said William J. Carroll also purchased a quarter section of said land on said reservation, as follows, to wit, cash entry number five hundred and ninety five, being lots numbered three, eight, fifteen and sixteen of section number eighteen, township one south, range thirty three E., W. M., and made October 22, 1902.

That the said Rosa Carroll made application to purchase said land at the instance and request and for the use and benefit of Henry Wade.

That said Rosa Carroll has not at any time before or since making said entry established a residence or lived upon said tract of land or any part thereof, nor has she in any manner improved said land.

A correct decision of the questions presented by the appeal makes it necessary at the outset to determine the sufficiency of the charges made to sustain the contest, and this in turn depends upon a correct

construction of the acts under which the entry under investigation was made.

But for departmental decisions heretofore rendered it would be necessary, in this connection, to fix the relation of the separate acts and to discover what, if any, effect the latter act has upon the original statute in so far as it might modify, restrict, or enlarge any of its provisions, as it is by the latter act alone that the preference right to enter any of these lands is conferred. However, this question has been settled by departmental decisions in the cases of *Davis v. Nelson* (33 L. D., 119), and *Hoover v. Jones* (ib., 472), wherein it was decided that the two acts are *in pari materia*, and that the effect of the later act was not restrictive but on the contrary was supplemental to the first and enlarged the original act by permitting a disposition of the lands at private sale as well as at public sale, but upon the same terms and conditions as provided by the original act governing public sales. The second act also enlarged the first to the extent that a preference right to enter was conferred upon a specified class.

In the case of *Davis v. Nelson*, *supra*, it was said:

Reading the two acts together and looking to the purpose of Congress, it is obvious that the acts should be read as if the second were merely another section of the first and provided that the remaining lands, which were not disposed of at public sale, should be subject to private cash entry.

In addition, the preference right mentioned was conferred, but beyond this no greater effect can be given to the second act to extend the terms of the first.

This brings us to an examination of that part of the contest charge touching the alleged wrongful assertion of such preference right by Carroll. The opinion of the Department, after a careful examination of all the evidence before it, briefly stated, is: She had not performed the necessary acts or any act of *bona fide* settlement on the land at the time she asserted the preference right of entry, and was not therefore entitled to claim such right. That she did claim it is evident from the statements made and relied upon by her in her applications, but, even conceding that the claim was erroneously asserted, it does not necessarily follow that the validity of her entry is in any manner affected thereby. If at the time she asserted such right she might as easily have made her entry without claiming the benefit thereof, the Department is of opinion that it is wholly immaterial so far as the validity of her entry is concerned, how she proceeded. Had there been an intervening adverse preference right set up within the ninety-day period allowed for asserting it, then as between the parties claiming such right the question must be determined, and in such case if entry has been made by one under a preference to which he is not entitled, his entry must be canceled

upon the protest of a party entitled to a superior right. But it is not believed that an entry made by one during the ninety-day period even though under a mistaken claim of preference, can, under the statute, be canceled for invalidity on that ground alone, if no superior adverse preference right is set up until after the expiration of that period. Certainly it can not be canceled where there is no such superior adverse right existing, for in such case the entryman was not compelled to seek the protection of such right but might as well have based his right to enter solely upon his naked application. In other words, where there is no existing preference right in another at the time of entry, the assertion of such right by the claimant is wholly unnecessary and can not therefore be held to be more than a mere irregularity in no way affecting the validity of his entry. The contest in so far as it rests upon allegations touching the preference right of Carroll must fail.

It is further contended that the allegations going to the failure of Carroll to maintain residence on the land are insufficient as ground of contest. In the opinion of the Department there is no lack of proof of her failure in this respect. The finding of your office that Carroll was not the head of a family at the time she made the entry is undoubtedly correct, and she could not therefore, coincident with the maintenance of marital relations with her husband, who, it is admitted, never resided on the land after entry, establish her claim of separate residence thereon. However, the original statute not having been modified, except as already stated, must govern as to residence, and unless it warrants the bringing of contest upon this ground, the contention of claimant must be sustained. The statute, after reciting the manner of making entry, payment, etc., declares:

And before patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation.

In departmental decision in the case of Charles O. Fanning (20 L. D., 297, 298); construing the effect of the statute as to residence, it was held, defining the action to be taken where no satisfactory proof of residence had been made:

While you should refuse to issue patent upon a purchase of these lands until satisfactory proof of residence and cultivation, as required, is shown, yet, if the payments are made within the time required, an entry can not be avoided, and I have, therefore, to direct that Fanning be advised of the rejection of his proof and that said entry be suspended until satisfactory proof is made showing compliance with the law in the matter of residence and cultivation.

It is clear that upon this construction contest can not be sustained upon the charge that claimant has failed to comply with the law in the matter of residence until the time within which such proof shall

be submitted is fixed. This the statute does not do. But it does not necessarily follow that because of this the fulfillment of the condition may be indefinitely postponed.

But in a case of conveyance upon condition, where a prompt performance thereof is necessary to give the grantor, or the one who is to avail himself of the same, the whole benefit contemplated to be secured to him, or where its immediate fruition formed his motive for entering into the agreement, the grantee shall not have his lifetime for its performance, but must do it in a reasonable time. [Wash. Real Prop., Vol. 2, p. 11.]

When the claimant submits his proof he elects to stand or fall thereon. By his own act he determines the time within which proof shall be submitted; he fixes the period which before was indefinite and determinable only by the grantor, and in the face of a contest will not be permitted, if the proof is insufficient or fraudulent, to cure his default. The broad language used in the Fanning case (*supra*) was not intended to extend the general rule beyond well established limits. The submission of final proof is a declaration on the part of claimant that all the requirements of law have been honestly and fully met. (Langer v. Wasman 34 L. D., 426, 430.) By such act contest is invited and if by such means the fraudulent nature of the proof is disclosed, claimant has no equitable right remaining upon which to base a request to submit new proof. If there were no adverse claims and the proof submitted was in some respect unsatisfactory but untainted with fraud, as in the Fanning case (*supra*), further opportunity might be afforded claimant to submit other proof.

Final proof having been submitted by Carroll, her entry thereupon became contestable for failure to establish and maintain residence on the land, and the charge having been fully sustained, her entry must be canceled. The judgment of your office is accordingly hereby affirmed.

SETTLERS UPON ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 22, 1906.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of April 17, 1906 (Public, No. 106), reads as follows:

That all qualified homesteaders who made settlement upon and improved any of the land hereinafter designated and who were prevented from securing title to such land by reason of the contracts hereinafter described shall, in

making final proof upon homestead entries made for other lands, be given credit for the period of their *bona fide* residence on and the amount of their respective improvements upon the land for which they were so prevented from completing title, including the time of continuous residence upon and improvements of said land while defending in good faith their respective claims thereto as homestead settlers. The land above referred to is that part of the indemnity grant to the Saint Paul, Minneapolis and Manitoba Railway Company defined by the acts of Congress dated, respectively, March third, eighteen hundred and fifty-seven (Eleventh Statutes, page one hundred and ninety-five, chapter ninety-nine), and March third, eighteen hundred and sixty-five (Thirteenth Statutes, page five hundred and twenty-six, chapter one hundred and five), which by reason of certain contracts between Reverend John Ireland and the Saint Paul, Minneapolis and Manitoba Railway Company, one dated July seventeenth, eighteen hundred and eighty, and one dated March thirtieth, eighteen hundred and eighty-three (more particularly described in the decision of the Commissioner of the General Land Office contained in his letter of February third, eighteen hundred and ninety-eight, in the appeal of the case of John Ireland against Joseph Bennon and others from the action of the local land office and at Saint Cloud, Minnesota), the said John Ireland and those with whom he contracted to sell certain of said lands, either for himself or for said railway company, were held authorized to purchase from the United States under the provision of section five of the act of March third, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page five hundred and fifty-six), after the date upon which the claim of said railway company to receive said lands as indemnity lands had been denied and canceled by the Interior Department: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage thereof: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands so settled upon and improved by him.

The persons intended to be benefited by this act are those who settled as homestead claimants upon lands within the indemnity limits of the grants by Congress to aid in the construction of the St. Paul, Minneapolis and Manitoba Railway and who failed to obtain title because of the superior claims of Reverend John Ireland and others under the act of March 3, 1887, as purchasers from said railway company, and such claimants to come within the provisions of the law must have been qualified homesteaders at the time of their settlements and residence upon their original claims, and their entries must be made within two years from the date of the approval of this act, to wit, on or before April 17, 1908. Those persons who have received the benefits of the homestead law since being prevented from completing title to the lands within the limits of the railway grants settled upon and improved by them are excluded from the benefits of the act.

Therefore, when any homestead claimant in making final proof on his homestead entry claims credit under the provisions of this act for the period of his residence and the amount of his improvements upon his original claim, which may include the time of his continuous resi-

dence and improvements while defending in good faith his claim as a homestead settler, you will require him to make affidavit as to the facts relative to his settlement, residence, and improvements thereon which must describe such claim by legal subdivisions and be corroborated by the affidavits of at least two witnesses having knowledge of such facts, and said affidavits must satisfactorily show compliance with the law to the extent claimed, as they will form part of the final proof for the land, title to which is sought.

You will also require the claimant to make affidavit that he has not received the benefits of the homestead laws since being prevented from completing title to the land originally settled upon and claimed.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved, May 22, 1906:

E. A. HITCHCOCK, *Secretary*.

OPENING OF CEDED PORTION OF CROW INDIAN RESERVATION IN MONTANA.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas, By an agreement between the Indians of the Crow Indian Reservation in Montana, on the one part, and Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, Commissioners on behalf of the United States, on the other part, amended and ratified by act of Congress approved April twenty-seven, nineteen hundred and four (33 Stat., 352), said Indians ceded, granted, and relinquished to the United States all their right, title, and interest in and to the unallotted lands within the following boundaries, to-wit:

Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer military reservation; thence running due west to the northwest corner of said Fort Custer military reservation; thence due south to the southwest corner of said Fort Custer military reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the Principal Meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction following the present boundary of said reservation to the point of beginning.

And, Whereas, Under the act of Congress ratifying said agreement, among other things, it was provided:

That the unallotted lands, except such lands as may have been withdrawn for reclamation under the act of June seventeen, nine-

teen hundred and two (32 Stat., 388), and such tracts as may have been reserved for thirty days after the date of opening as subject to the preference right of entry of the purchasers of the improvements of the former Indian claimants thereon, and except sections sixteen and thirty-six, or lands selected in lieu thereof, which are reserved for common school purposes and are granted to the State of Montana for such purposes, shall be disposed of under the homestead, townsite, and mineral land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are open to settlement and entry: *Provided*, That as to the lands opened under such proclamation, all rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish war, or the Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one (31 Stat., 847), shall not be abridged.

Now, Therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power vested in me by the said act of Congress, do hereby declare and make known that all of the unallotted lands in said reservation, except such as may at that time have been withdrawn for reclamation under said act of June seventeenth, nineteen hundred and two, and such lands as may have been reserved as subject to the preference right of entry of the purchasers of the improvements of the former Indian claimants thereon, and except sections sixteen and thirty-six, or lands selected in lieu thereof, which are reserved for common school purposes for the State of Montana, will, on and after the sixteenth day of July, nineteen hundred and six, in the manner hereinafter prescribed, and not otherwise, be opened to settlement, entry, and disposition under the general provisions of the homestead, townsite, and mineral land laws of the United States.

And it is further provided that, commencing at 9 o'clock a. m. on Thursday, June 14, 1906, and ending at 6 o'clock p. m., Thursday, June 28, 1906, a registration will be held at Miles City and Billings, State of Montana, and Sheridan, State of Wyoming, for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said ceded lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified to make homestead entry of these lands under existing laws, by written

application to be made on a blank furnished only at the places herein designated for registration, by the Commissioner of the General Land Office, and to give the registering officers such appropriate matters of description and identity as will protect the applicant and the government against any attempted impersonation. Registration can not be effected through the use of the mails or the employment of an agent, except that honorably discharged soldiers and sailors entitled to the benefits of section twenty-three hundred and four of the Revised Statutes of the United States, as amended by the act of Congress approved March first, nineteen hundred and one (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank furnished by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands, and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldiers' declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Billings, Montana, commencing at 9 o'clock a. m., Monday, July 2, 1906, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to

thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed all of these sealed envelopes will be brought together at the place of the drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number and of the day upon which he must make his entry by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Commencing on Monday, July 16, 1906, at 9 o'clock a. m., the applications of those drawing numbers 1 to 125, inclusive, must be presented at the land office in Billings, Montana, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 126 to 250, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular application and the necessary accompanying proofs, together with the regular land office fees, but an

honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Persons who make homestead entry for any of the ceded lands will be required to pay four dollars per acre, payment in all cases to be made as follows: One dollar per acre at the time of entry, and the remainder to be paid in four equal annual installments, the first installment to be paid at the end of the second year. Upon all entries the usual fee and commissions shall be paid, as provided for in the homestead laws on lands the price of which is one dollar and twenty-five cents per acre.

In case any entryman fails to make the payments herein provided for, or any of them, promptly when due, all rights in and to the lands covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled, and the land embraced therein shall thereupon be subject to entry at the price and upon the terms above set forth. Lands entered under the townsite and mineral land laws shall be paid for in amount and manner as provided by said laws, but in no case at a less price than that fixed for such lands if entered under the homestead laws.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person or persons desiring to found, or to suggest establishing, a town site upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the

time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are not needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

All persons are especially admonished that under the said act of Congress approved April 27, 1904, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands, except in the manner prescribed in this proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry, and the lands are not subject to mineral exploration or location during that period. After the expiration of said period of sixty days, but not before, as hereinbefore prescribed, any of said lands which are non-mineral, remaining undisposed of, may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law, and such of said lands as are mineral will then be subject to the provisions of the mining laws.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof, I have hereto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 24th day of May, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.]

THEODORE ROOSEVELT.

By the President:

ELIHU ROOT,

Secretary of State.

OPENING OF CEDED PORTION OF CROW INDIAN RESERVATION IN MONTANA.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 24, 1906.

Register and Receiver,

United States Land Office, Billings, Montana.

GENTLEMEN: The following regulations are hereby prescribed for the purpose of carrying into effect the opening of the ceded portion of the Crow Indian Reservation in the State of Montana, provided

for in the act of Congress of April 27, 1904 (33 Stat., 352), and in the President's proclamation of May 24, 1906, thereunder:

First. Applications either to file soldiers' declaratory statement or make homestead entry of these lands must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, which fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will at once be carefully examined and forwarded to the Secretary of the Interior with proper recommendation, when the matter will be promptly decided.

Sixth. These regulations will supersede, during the sixty days from the opening of these lands, any rule of practice or other regulation governing the disposition of applications with which they may conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Seventh. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Give all possible publicity, through the press and otherwise, to these regulations.

W. A. RICHARDS, *Commissioner.*

Approved, May 24, 1906:

E. A. HITCHCOCK, *Secretary.*

CEDED CROW INDIAN LANDS—HOMESTEAD ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 24, 1906.

The following persons are not qualified to make homestead entry of the lands of the ceded portion of the Crow Indian Reservation, in Montana:

1. Any person who has made a prior homestead entry and is not entitled to make a second homestead entry. Under the act of June 5, 1900 (31 Stat., 267), any person who made a homestead entry and commuted the same prior to June 5, 1900, is entitled to make a second homestead entry; under the act of May 22, 1902 (32 Stat., 203), any person who made final five-year proof, prior to May 17, 1900, on lands to be sold for the benefit of Indians, and paid the price provided by law opening the land to settlement, and who would have been entitled under the "free homestead" law to have received title without such payment, had not proof been made prior thereto, is entitled to make a second homestead entry; under the act of April 28, 1904 (33 Stat., 527), any person who, prior to April 28, 1904, made homestead entry but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a *bona fide* effort to comply with the homestead law and did not relinquish his entry for a consideration, is entitled to make a second homestead entry; under section 2 of said act any person who has made a homestead entry of a quantity of land containing less than 160 acres, and is still owning and occupying the same, may enter a sufficient quantity of lands contiguous to the lands embraced in his original entry to make up the full amount of 160 acres; under section 6 of the act of March 2, 1889 (25 Stat., 854), any person who has made a homestead entry for less than 160 acres, and has received the receiver's final receipt therefor, is entitled to enter enough additional land, not necessarily contiguous to the original entry, to make 160 acres.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the Army or Navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is claiming under any of the public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land other than mineral land, which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS, *Commissioner.*

Approved, May 24, 1906:

E. A. HITCHCOCK, *Secretary.*

OPENING OF SHOSHONE OR WIND RIVER INDIAN RESERVATION IN WYOMING.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas, By an agreement between the Shoshone and Arapahoe tribes of Indians, belonging to the Shoshone or Wind River reservation in the State of Wyoming, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress approved March third, nineteen hundred and five (33 Stat., 1016), the said Indian tribe ceded, granted, and relinquished to the United States all the right, title, and interest which they may have had to all of the unallotted lands embraced within said reservation, except the lands within and bounded by the following described lines:

Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big-Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning.

And, Whereas, It was provided by said act of March three, nineteen hundred and five, that said unallotted lands ceded to the United States under said agreement should be disposed of under the provisions of the homestead, townsite, coal and mineral land laws of the United States, and should be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and six, which proclamation shall prescribe the manner in which the lands shall be settled upon, occupied, and entered by persons permitted to make entry thereof, and no person shall be permitted to settle upon, occupy or enter said lands except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are open to settlement and entry; and the rights of honorably discharged soldiers and sailors of the late civil and Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, as amended by the act of March one, nineteen hundred and one, shall not be abridged;

And, Whereas, The time for the opening of said unallotted lands was extended to the fifteenth day of August, nineteen hundred and

six, unless the President shall determine that the same may be opened at an earlier date, by Public Resolution of Congress, approved March twenty-eighth, nineteen hundred and six (Public Resolution No. Twelve);

Now, Therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the said Act and Resolution of Congress, do hereby declare and make known that all the unallotted lands in the ceded portion of said reservation, except such as may at that time have been reserved for carrying out the provisions of said amended treaty relative to the rights of Asmus Boysen, allowing him to locate in accordance with the Government surveys not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation, and to purchase the same, will, on and after the fifteenth day of August, nineteen hundred and six, in the manner hereinafter prescribed, and not otherwise, be opened to settlement, entry, and disposition under the general provisions of the homestead, townsite, coal, and mineral land laws of the United States.

And it is further directed and provided that commencing at nine o'clock a. m., on Monday, July 16, 1906, and ending at six o'clock p. m., Tuesday, July 31, 1906, a registration will be held at Lander, Shoshoni, and Thermopolis; also, at Worland, provided that the Big Horn Railroad, now in course of construction, shall be completed and doing a passenger traffic to that place on July 16, 1906, for the purpose of ascertaining the names and qualifications of all persons who desire to enter, settle upon, or acquire title to any of said ceded lands under the homestead laws.

To obtain registration for the purpose of making a homestead entry of any of said ceded lands each applicant will be required to show himself duly qualified under the law to make such entry, and this showing must be made by the presentation of a sworn application for registration executed on a blank furnished by the Commissioner of the General Land Office which can be obtained only at the time and places of registration herein mentioned, and each person registering must give the registering officer such appropriate matters of description and identification as will protect the applicant and the Government against any attempted impersonation.

Registration can not be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section twenty-three hundred and four of the Revised Statutes of the United States, as amended by the act of Congress approved March one, nineteen hundred and one (31 Stat., 847), may present their applications for registration for the purpose of making a homestead entry and make due proof

of their qualifications through an agent of their own selection having a duly executed power of attorney on a blank furnished by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one soldier or sailor. No person will be permitted to register more than once, nor will he be permitted to register in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a non-transferable certificate to that effect, and each person holding such certificate will be entitled to go upon any ceded lands subject to entry hereunder and examine such lands, but the only purpose for which he can go upon and examine such lands is to enable him later on, as herein provided, to understandingly select the lands for which he may make entry.

The order in which during the first sixty days following the opening the registered applicants will be permitted to make homestead entry of lands opened hereunder will be determined by a drawing for the district, held at Lander, Wyoming, commencing at nine o'clock a. m., Saturday, August 4, 1906, and continuing for such period necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card which must be signed by the applicant, and give such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notices of the drawing, stating the name of each applicant and the number assigned to him by the drawing, will be posted each day at the place of the drawing, and each applicant will be notified of his

number and the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of the registration. The result of each day's drawing will also be given to the press and published as a matter of news. Applications for homestead entry during the sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Commencing August fifteenth, nineteen hundred and six, at nine o'clock a. m., the applications of those persons drawing numbers 1 to 100, inclusive, entitling them to make homestead entries, must be presented at the land office at Lander, Wyoming, in the land district in which the said lands are situated and will be considered in their numerical order during the first day, and the applications of those drawing numbers 101 to 200, inclusive, entitling them to make homestead entries, must be presented and will be considered in their numerical order during the second day, and so on, Sundays excluded, at the rate of 100 such applications per day until and including August twenty-fifth, nineteen hundred and six; on and after August twenty-seventh, nineteen hundred and six, such applications will be considered in like manner at the rate of 120 per day, Sundays excluded, until and including September sixth, nineteen hundred and six; on and after September seventh, nineteen hundred and six, such applications will be considered at the rate of 140 per day, Sundays excluded, until and including September eighteenth, nineteen hundred and six; on and after September nineteenth, nineteen hundred and six, such applications will be considered at the rate of 160 per day, Sundays excluded, until and including September twenty-ninth, nineteen hundred and six; and on and after October one, nineteen hundred and six, such applications will be considered at the rate of 170 per day, Sundays excluded, until and including October thirteenth, nineteen hundred and six, the expiration of the sixty day period.

If any applicant fails to appear and present his application to make a homestead entry, when the number assigned to him by the drawing is reached, his application to enter will be passed until after the other applications assigned to that day have been disposed of, when he will, on that day, be given another opportunity to make entry, and if he fail to do so he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry each applicant will personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If, at the time of considering the regular application to enter, it appear that the applicant is disqualified from making homestead entry on these lands his application will be rejected notwithstanding his prior registration. If any applicant shall register more than once hereunder or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for and will be precluded from entering or settling upon any of said lands during the first sixty days following the opening.

Persons who make homestead entries for any of the ceded lands within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the lands embraced in their entries and for all of the ceded lands thereafter entered under the homestead laws the sum of one dollar and twenty-five cents per acre shall be paid, payment in all cases to be made as follows:

Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid. Upon all entries the usual fees and commissions shall be paid as provided for in the homestead laws on lands the price of which is one dollar and twenty-five cents per acre.

In case any entryman fails to make the payments hereinbefore provided for under homestead entries within the time stated, the right of said entryman to the lands covered by his or her entry shall be forfeited and the entry will be canceled.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendations in the premises. Such Commissioner, if he believe the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are not needed for townsite purposes, they may be released from such withdrawal and then disposed of

under the general provisions of the homestead laws in the manner prescribed herein.

The lands entered under the townsite, coal and mineral land laws shall be paid for in amount and manner provided by the laws under which they are entered, and unless entry and payment under mineral locations shall be made within three years from date of location, all rights thereunder shall cease.

All persons are especially admonished that under said act of Congress approved March three, nineteen hundred and five, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of said period of sixty days, but not before, as herein prescribed, any of said lands remaining undisposed of may be settled upon, occupied, entered, or located under the general provisions of the homestead, townsite, coal and mineral land laws of the United States in like manner as if the manner affecting such settlement, occupancy, entry, and location had not been prescribed herein in obedience to law.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 2nd day of June in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.]

THEODORE ROOSEVELT

By the President:

ELIHU ROOT,
Secretary of State.

OPENING OF CEDED PORTION OF SHOSHONE OR WIND RIVER INDIAN
RESERVATION IN WYOMING.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 4, 1906.

Register and Receiver,

United States Land Office, Lander, Wyoming.

GENTLEMEN: The following regulations are hereby prescribed for the purpose of carrying into effect the opening of the ceded portion of the Shoshone or Wind River Indian Reservation in the State of Wyoming, provided for in the act of Congress of March 3, 1905 (33

Stat., 1016), and in the President's proclamation of June 2, 1906, thereunder:

First. Applications either to file soldiers' declaratory statement or make homestead entry of these lands must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, which fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will at once be carefully examined and forwarded to the Secretary of the Interior with proper recommendation, when the matter will be promptly decided.

Sixth. These regulations will supersede, during the sixty days from the opening of these lands, any rule of practice or other regulation governing the disposition of applications with which they may conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Seventh. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Give all possible publicity, through the press and otherwise, to these regulations.

W. A. RICHARDS, *Commissioner.*

Approved June 4, 1906:

E. A. HITCHCOCK, *Secretary.*

SHOSHONE OR WIND RIVER INDIAN LANDS—HOMESTEAD ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 1, 1906.

The following persons are not qualified to make homestead entry of the lands of the ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming:

1. Any person who has made a prior homestead entry and is not entitled to make a second homestead entry. Under the act of June 5, 1900 (31 Stat., 267), any person who made a homestead entry and commuted the same prior to June 5, 1900, is entitled to make a second homestead entry. Under the act of May 22, 1902 (32 Stat., 203), any person who made final five-year proof, prior to May 17, 1900, on lands to be sold for the benefit of the Indians, and paid the price provided by law opening the land to settlement, and who would have been entitled under the "free homestead" law to have received title without such payment, had not proof been made prior thereto, is entitled to make a second homestead entry; under the act of April 28, 1904 (33 Stat., 527), any person who, prior to April 28, 1904, made homestead entry but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a *bona fide* effort to comply with the homestead law and did not relinquish his entry for a consideration, is entitled to make a second homestead entry; under section 2 of said act any person who has made a homestead entry of a quantity of land containing less than 160 acres, and is still owning and occupying the same, may enter a sufficient quantity of lands contiguous to the lands embraced in his original entry to make up the full amount of 160 acres; under section 6 of the act of March 2, 1889 (25 Stat., 854), any person who has made a homestead entry for less than 160 acres, and has received the receiver's final receipt therefor, is entitled to enter enough additional land, not necessarily contiguous to the original entry, to make 160 acres.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the Army or Navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is claiming under any of the public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land other than mineral land, which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS, *Commissioner*.

Approved June 4, 1906:

E. A. HITCHCOCK, *Secretary*.

EVEN-NUMBERED MINERAL SECTIONS IN FORMER UNCOMPAHGRE INDIAN RESERVATION, UTAH.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas, by the act of Congress approved June 7, 1897 (30 Stat., 87), it was provided:

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances, is reserved to the United States.

And whereas, it is provided by the act of Congress approved March 3, 1903 (32 Stat., 998), entitled, "An act making appropriations for the current and contingent expenses of the Indian Department," etc., as follows:

That in the lands within the former Uncompahgre Indian reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah county, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah county, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this act, and not less than ninety days before the time of sale

or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that the even-numbered sections of surveyed lands in said former Uncompahgre Indian reservation in Utah, heretofore reserved by said act of June 7, 1897, to the United States as containing deposits of gilsonite, asphaltum, elaterite or other like substances, saving and excepting such of said even-numbered sections as may be appropriated and claimed under discoveries and locations made and recorded prior to January first, eighteen hundred and ninety-one, and relocated and re-recorded as specified by said act of March third, nineteen hundred and three (32 Stat., 998), and saving and excepting lands allotted to Indians, and all other lands legally reserved or appropriated, shall be offered for sale upon sealed bids at the Vernal, Utah, land office in tracts not exceeding forty acres in the aggregate, or the smallest legal subdivision approximating that area; and that the even-numbered sections of said lands, now unsurveyed, after the date on which the township plat of survey thereof is officially filed in the local land office in the usual manner, as well as any of the lands offered at this sale remaining unsold may be advertised and sealed bids invited therefor upon the same terms at the same place and at such time as may be specified in a public notice duly given by direction of the Secretary of the Interior. Inasmuch as the government is unable to determine definitely those tracts in the surveyed even-numbered sections principally valuable for deposits of gilsonite, asphaltum, elaterite or other like substances bids may be offered for any forty-acre tract or lot approximating that area subject to the regulations as to proof of character of the land, to be hereafter issued.

The bids for the lands offered will be opened at the Vernal, Utah, land office on Saturday, September 15, 1906, commencing at one o'clock p. m., mountain standard time, and will continue from day to day until all bids have been examined.

All bids to receive consideration must be filed in the district land office at Vernal, Utah, before 4:30 o'clock p. m. of the day preceding that set for the opening of the bids.

The right is reserved to reject any and all bids.

As an individual, or as a member of an association, the purchaser must be twenty-one years of age and a citizen of the United States or have declared his intention to become such citizen.

Bids for said lands shall be in accordance with such form, and at such minimum price as shall be prescribed by the Secretary of the Interior who shall also prescribe all additional rules and regulations necessary to carry into full effect the sale herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 6th day of June in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.]

THEODORE ROOSEVELT.

By the President:

ELIHU ROOT, *Secretary of State.*

EVEN-NUMBERED MINERAL SECTIONS IN FORMER UNCOMPAHGRE INDIAN RESERVATION, UTAH.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 25, 1906.

For the purpose of carrying into effect the sale of the even-numbered sections in the former Uncompahgre Indian reservation in Utah, valuable for deposits of gilsonite, asphaltum, elaterite or other like substances under the President's proclamation dated June 6, 1906, the following regulations are prescribed.

Sealed bids must be prepared, filed, received, opened and acted on in accordance with the following requirements:

First. Each bid must be made on a form similar to that attached hereto which shall be furnished upon application to the register and receiver of the Vernal, Utah, land office or the Commissioner of the General Land Office and must be signed by the bidder who shall be a citizen of the United States and who shall therein give his post-office address.

Second. Each bid must be sealed in a separate envelope which shall be addressed to the "Register and Receiver, United States Land Office, Vernal, Utah," and such envelope must bear an indorsement across its face showing that it contains a bid for land in the even-numbered sections in the former Uncompahgre Indian reservation containing deposits of gilsonite, asphaltum, elaterite or other like substances and must not bear any indication of the amount of such bid or the description of the tract bid for.

Third. Each bid must be accompanied by a check payable to the Secretary of the Interior certified by the proper official of a national bank for twenty per centum of the amount of such bid which check must be by the bidder placed in the envelope containing the bid.

Fourth. No bid will be considered that is received by such register and receiver after 4:30 o'clock p. m., mountain standard time, on Thursday the fourteenth day of September, nineteen hundred and six.

Fifth. Separate bids must be made for each forty-acre tract or fractional lot constituting a quarter of a quarter section. No bid will be considered describing the tract bid for otherwise than as it is described on the official plats of survey.

Sixth. Each bidder may present bids for any number of tracts but with each bid must make and transmit the deposit above required.

Seventh. No bid will be accepted for said lands which shall be at a less rate than five dollars per acre for the land embraced in such bid.

Eighth. The bids will be opened by the register and receiver at their office in the presence of such bidders as may care to attend on Friday the fifteenth day of September, 1906, at 1 p. m., mountain standard time, and the register and receiver will indorse on each bid the name of the bidder, the amount of the bid and the amount of the deposit immediately after the bids are opened.

Ninth. The register and receiver will then transmit the several bids with the certified checks to the Commissioner of the General Land Office. The Commissioner will transmit the said bids to the Secretary of the Interior with his recommendation in the premises.

Tenth. Notice of the award by the Secretary of the Interior upon the said sealed bids will be given to each of the bidders by the Commissioner of the General Land Office through ordinary mail to the address given in his bid.

Eleventh. The balance due on all the accepted bids after crediting thereon the respective certified checks will become due and must be paid to the register and receiver of the said local land office within thirty days from the date of the mailing of notice by the Commissioner of the General Land Office as aforesaid and if not so paid the amount deposited with such bid as hereinbefore provided will be forfeited to the United States to be disposed of as are other proceeds arising from said sale under said act and the land will be thereafter re-offered under such rules and regulations as may be prescribed by the Secretary of the Interior.

Twelfth. On the payment of the amount of their bids by the purchasers as hereinbefore provided the register and receiver will issue the ordinary cash certificates and receipts modified by endorsements across the face thereof showing that same are issued for lands of the former Uncompahgre Indian reservation in Utah valuable for deposits of gilsonite, asphaltum, elaterite or other like substances, under the act of March 3, 1903 (32 Stat., 998), which will be transmitted to this office as the basis of patent. The duplicate receipt will be given to the purchaser by the receiver upon the full payment.

Thirteenth. Each bidder will be required to file with his bid an affidavit showing himself to be a citizen of the United States, twenty-

one years of age, and furnish evidence in the form of affidavits duly corroborated that the lands sought to be purchased by him are principally valuable for deposits of gilsonite, asphaltum, elaterite or other like substances, and that the same are not claimed or held under discovery and location made and recorded prior to January 1, 1891, and relocated and re-recorded as specified in the act.

Fourteenth. All bids will be subject to mineral claims asserted by parties claiming a preference right to the lands entered by reason of the terms of said act of March 3, 1903, and for the purpose of giving such adverse claimants an opportunity of presenting their objections no patents will issue on the lands sold for a period of thirty days from date of issuance of final receipt. Parties alleging the lands sold to be non-mineral or valuable solely for minerals other than those named in this circular or otherwise legally appropriated may also be heard within the period specified. All protests against the sale must be under oath and duly corroborated and when based upon a claim of preference right under the act shall be accompanied by record evidence of location showing a compliance with the terms of the act. Cases arising under this paragraph will be adjudicated under the rules of practice of the Department of the Interior so far as they are applicable but the proceedings will be treated as special until the final determination thereof.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

BID.

THE SECRETARY OF THE INTERIOR,

SIR: I, _____, of _____, State of _____, a citizen of the United States, do hereby bid and offer to pay _____ dollars per acre for the following described tract of land of the former Uncompahgre Indian reservation in Utah valuable for deposits of gilsonite, asphaltum, elaterite or other like substances:

I herewith enclose certified check of _____, for _____ dollars, the same being twenty per cent of the total amount of this bid for the above described land, the same to be retained and credited as part payment of the purchase price should this bid be accepted, or retained by the United States as a forfeit on my part if this bid is accepted and I should within thirty days from the mailing of the notice by the Commissioner of the General Land Office of its acceptance, fail to pay the register and receiver at the Vernal, Utah, land office the balance due on this bid. I inclose herewith evidence of citizenship and evidence that the lands sought to be purchased by me are principally valuable for deposits of gilsonite, asphaltum, elaterite or other like substances and that the same was not claimed or held under discovery or location made and recorded prior to January 1, 1891, and relocated and re-recorded as specified in the act.

This _____ day of _____, 1906.

WITHDRAWAL UNDER ACT OF JUNE 17, 1902—SOLDIERS' ADDITIONAL ENTRY—FORT ASSINIBOINE MILITARY RESERVATION.

MARY C. SANDS.

An entry is a contract between the government and the entryman, and until all the requisites of an entry have been met no contract exists and the applicant can acquire no vested right to the land which will prevent a withdrawal thereof by the government.

Lands withdrawn under the provisions of the act of June 17, 1902, from all disposition "except under the homestead laws," are not subject to soldiers' additional entry under section 2306 of the Revised Statutes.

The fact that the act of April 18, 1896, provides that the lands in the abandoned portion of the Fort Assiniboiné military reservation, thereby opened to entry, shall be disposed of only under the laws therein specifically named, does not prevent a withdrawal, under the provisions of the act of June 17, 1902, of any of said lands as to which no vested right has attached.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 6, 1906.* (D. C. H.)

Mary C. Sands, as assignee of Abram C. Peterbaugh, has appealed from your office decision of August 3, 1905, holding for cancellation her soldiers' additional entry for lot 7 of Sec. 3, T. 32 N., R. 15 E., Greatfalls, Montana, containing 36.54 acres, and allowed under section 2306 of the Revised Statutes on April 22, 1905, in accordance with instructions contained in your office letter of March 25, 1905. Your office held said entry for cancellation, for the reason that it appeared from the records of said office that the township in which the land in question is situated was withdrawn under the act of June 17, 1902 (32 Stat., 388), by order of the Secretary of the Interior, dated April 12, 1905, and that therefore the land embraced in the said entry was not subject to location under a soldiers' additional homestead right at the time the entry was allowed, April 22, 1905. The appeal is based on the following grounds:

1. Applicant's rights became vested before the land was withdrawn.
2. The Secretary had no authority under the act of June 17, 1902, to withdraw this land from entry because the land was not subject to withdrawal under said act.

Appellant's contention under the first assignment of error seems to be based upon the fact that since your office by its former letter of March 25, 1905, directed that her application for said land be allowed, her rights thereby became vested and could not be interfered with or prejudiced by the subsequent order of April 12, 1905, withdrawing the land.

This contention is not sound and cannot be admitted. It has been held that an entry is a contract between the government and the entryman. Under the law three things are necessary to be done in order to constitute an entry on public lands: first, the applicant must

make an affidavit setting forth the facts which entitle him to make the entry; second, he must make a formal application; and third, he must make payment of the money required. Until all three of these requisites are complied with, no such contract exists, and the applicant can acquire no vested rights in the land sought to be entered. The receiver's receipt filed in this case shows that the money was not paid until April 22, 1905, at which time it also appears that the final certificate was issued. There being then no contract existing between the government and the applicant at the date of the withdrawal of the township in which the land in question is situated, the applicant acquired no vested rights by his application to enter said land, although the same was filed before the lands in said township were ordered to be withdrawn.

It is further contended by appellant that soldiers' additional entries under section 2306 of the Revised Statutes are in the nature of homestead entries, and although lands susceptible of irrigation, under the act of June 17, 1902, *supra*, may be withdrawn from entry except under the homestead laws, the lands are still, under said exception, subject to entry by one holding a right under the aforesaid section of the Revised Statutes.

The question presented by this contention was well and carefully considered by the Department in the cases of Cornelius J. MacNamara and William W. Wooldridge (33 L. D., 520 and 525), and it was therein held that lands withdrawn under the act of June 17, 1902, as susceptible of irrigation, are not subject to soldiers' additional entry under section 2306 of the Revised Statutes, and now, upon reconsideration of the question and the matters urged in support of appellant's contention, the Department sees no reason for disturbing the decisions rendered in the aforesaid cases, and they will be adhered to.

It is also contended that the land in question is within the limits of that portion of the Fort Assiniboine military reservation, which was abandoned in 1888, and for that reason was not a part of the public lands and not subject to withdrawal under the act of June 17, 1902.

To sustain this contention the appellant cites the act of April 18, 1896 (29 Stat., 95), which, among other things, provides that the abandoned portion of said reservation—

shall be open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands, and shall not be subject to sale under the provisions of any act relating to the sale of abandoned military reservations.

Appellant insists that under the provisions of said act of 1896, limiting the lands to entry for the purposes therein specially named,

the Secretary of the Interior was precluded from withdrawing said lands for irrigation purposes under the act of June 17, 1902.

There is no force in this contention. The restriction in the said act of 1896, limiting the lands to entries of the character therein specified, did not deprive Congress of control over said lands, and of the right to subject them to use for any other purpose which in its judgment it might deem suitable and proper.

The Secretary of the Interior having by virtue of the authority given by said act of 1902 withdrawn the land in question from entry for the purposes therein specified, before any vested right attached thereto, said withdrawal must be given full force and effect. See instructions of January 13, 1904 (32 L. D., 387-388).

Upon a full consideration of the whole matter, your decision is hereby affirmed.

MINING CLAIM—EXPENDITURE—CLAIMS HELD IN COMMON.

LAWSON BUTTE CONSOLIDATED COPPER MINE.

Improvements made upon one or more of several contiguous mining claims held in common may be accepted as applicable to the entire group, in satisfaction of the statutory requirement relative to the expenditure of five hundred dollars upon or for the benefit of each of the claims, only where the purpose of such improvements is to facilitate the extraction of mineral from the claims, and the improvements are of such character as to redound to the benefit of all the claims in this respect; and the fact that the mineral formation covered by the claims is a continuous deposit constituting one ore mass, will not justify applying the cost of improvements on one of the claims toward meeting the requirements of the statute as to the others, unless it appear that such improvements will aid in the extraction of mineral from, or tend to promote the development of, such other claims.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 8, 1906.* (G. N. B.)

December 29, 1902, the Trinity Copper Company made entry under the name of Lawson Butte Consolidated Copper Mine, for the Lawson Butte, Poker, 44, Bories, Sunshine, Comet, Montana, Columbia, Sheep Springs, 99, Colorado, Martin, Mascot, Robin, Interview, Doe, Big Buck, Blue Jay, Boston Copper, Black Oak, Pine Bur, Lester, and Sage, contiguous lode mining claims, survey No. 3937, Redding, California.

July 18, 1904, your office held the entry for cancellation to the extent of the Lawson Butte, Poker, 44, Black Oak, Pine Bur, Lester, Sage, Doe, Big Buck, and Blue Jay claims, on the stated ground that the certificate of the surveyor-general does not show that five hun-

dred dollars' worth of labor had been expended or improvements made upon or for the benefit of each of said claims prior to the expiration of the period of publication. Subsequently the company submitted a number of affidavits with a view to establish that the improvements made are sufficient to satisfy the requirements of the statute. By decision of April 13, 1905, your office held the showing made to be insufficient and adhered to the former decision.

The company has appealed to the Department.

It appears from the evidence that the claims in the group extend over and cover both sides of a high ridge or mountain. The Doe, Big Buck, and Blue Jay claims lie at the bottom of the westerly side of the ridge and are crossed by Spring creek. The remainder of the excluded claims lie at the bottom of the easterly side of the ridge.

The improvements certified by the surveyor-general consist of tunnels, cuts, a shaft, buildings, and trails, and aggregate in value \$14,640, which (exclusive of the trails valued at \$500) might be sufficient to satisfy the requirements of the statute, provided the improvements were so situated and of such a character as to redound to the benefit of all the claims. The value of the expenditures upon each of the excluded claims is less than \$500. The surveyor-general certifies that a tunnel upon the Interview claim, valued at \$2,000, and one on the Robin claim, valued at \$1,400, are for the benefit of those claims, and also for the benefit of the Colorado, 99, Doe, Big Buck, and Blue Jay claims. The tunnels referred to are projected in a northeasterly direction and away from the Doe, Big Buck, and Blue Jay claims, and the portals thereof, from the official plat, appear to be at least 1,000 feet above any portion of the surface of said claims.

The surveyor-general also certifies that a tunnel on the Mascot claim, valued at \$4,000, one on the Boston Copper, valued at \$1,700, and one on the Columbia, valued at \$1,200, and the additional improvements, in the way of numerous shallow open cuts, small tunnels, and a shaft, in the aggregate valued at \$2,285, which he found at different points on ten of the claims, are for the benefit of the claims upon which they are situated as well as the other claims in the group. The tunnels referred to do not run toward the 44, Poker, Lawson Butte, Black Oak, Pine Bur, Lester, and Sage claims, nor toward the other excluded claims. The portals are at a much higher elevation than any portion of the said claims, and at a considerable distance therefrom. It is not shown by the surveyor-general's certificate, or otherwise, that the other improvements mentioned were designed, or could be used, for the benefit of other claims than those upon which they are situated.

It is asserted by the appellant that the evidence shows that the mineral formation covered by the claims is a continuous deposit con-

stituting the ore mass of or in the mountain, and because thereof it is contended that the improvements made and certified by the surveyor-general are a good and sufficient means or system of development of all the claims.

It is well settled that improvements made upon one or more of several contiguous claims held in common may be accepted in satisfaction of the statutory requirement only where the purpose of such improvements is to facilitate the extraction of mineral from the claims, and the improvements are of such character as to redound to the benefit of all the claims in this respect. *Copper Glance Lode* (29 L. D., 542,549), and authorities cited. It must appear that each of the claims constituting the group will profit by the work done or improvements made upon one or more of such claims. *Elmer F. Cassel* (32 L. D., 85, 87.)

Assuming that the mineral exists in a practically continuous mass in the body of the mountain and extends under the surface of the entire group of claims embraced in the entry, as asserted by the appellant, it does not appear how the tunnels relied upon, which are projected away from and at a point high above the surface of the excluded claims, could in any manner aid in the extraction of mineral from such excluded claims, or could tend to promote their development. The tunnels if continued in their projected courses would not reach the deposit under the surface of the excluded claims, and could not by any possibility be utilized for their benefit. Under these circumstances the improvements relied upon to satisfy the statutory requirement are not such as may be applied to the claims excluded from the entry. The decision of your office is affirmed.

SCHOOL LANDS—IDENTIFICATION BY SURVEY—LANDS EXCEPTED—ACTS
FEBRUARY 22, 1889, AND FEBRUARY 28, 1891.

STATE OF SOUTH DAKOTA *v.* RILEY.

Under the grant of sections sixteen and thirty-six made to the State of South Dakota for school purposes by the act of February 22, 1889, the State takes no vested interest or title to any particular land until it is identified by survey, and prior to such identification the grant, as to any particular tract, may be wholly defeated by settlement, the State's only remedy in such case being under the indemnity provisions of said act and of the act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 8, 1906.* (J. R. W.)

The State of South Dakota filed a motion for review of departmental decision of June 28, 1905 (unreported), dismissing its protest

against allowance of Mathew Riley's final proof on his homestead entry as to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 36, T. 3 S., R. 3 E., Rapid City, South Dakota.

Riley has resided on the land continuously since May, 1891. The land is in the Black Hills forest reserve, created by executive proclamation of February 22, 1897 (29 Stat., 902). The township plat of survey was filed in the local office December 15, 1899. The entry was not made until July 25, 1902, under the act of April 15, 1902 (32 Stat., 106).

The motion involves two points: (1) that the school land grant to the State was *in presenti* of specific sections, whether surveyed or not; (2) but if not so, then upon Riley's failure to make entry within three months from filing of the plat, the State's right attached, and Congress was without power to divest that right.

The grant was made by sections 10 and 11 of the act of February 22, 1889 (25 Stat., 676, 679), which, so far as here material, provides that:

Sec. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.

Sec. 11. * * * and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It is necessary to a proper construction of the act to consider all its provisions and other legislation on the same subject and the administrative constructions thereof, as well as, and in connection with, the last quoted clause, in determining its proper meaning. That Congress did not intend absolutely to dispose of the sections granted, beyond any power to control their use and disposal in such manner as to exclude the State from any benefit of them, is clear from the proviso to section 10, which declared those sections in permanent reservations for national purposes not subject to the grant, and those in Indian, military, or other reservations of any character not subject to the grant until the reservation is extinguished. The

proviso was not limited to reservations then existing, but is unlimited as to the time of their creation. There is no appropriate word like "existing," or other word of like meaning, to so limit the power of Congress to withhold some of the granted sections. The United States being absolute owner of the lands could impose such limitation and qualification of its grant as it saw fit. But were there no qualification, the provision for indemnity for sections granted necessarily implies a power to defeat the grant by reservation to public use, or by other grants, prior to the survey and ascertainment of the sections granted.

All former grants of this character gave the States the sections granted, without restriction to surveyed land. The words "surveyed or unsurveyed" add nothing to the effect of the grant. Such grants have always been construed as effective to grant lands not at the time surveyed, as well as those then surveyed, attaching when survey was made. The United States therefore had the right, notwithstanding the last clause quoted of the grant, to provide how the land might be disposed of and the grant be defeated. It was for the United States alone to provide the rule or lapse of time whereby the settlement right should become barred. If Congress saw fit by the act of April 15, 1902, to extend the time for the settler to assert the right of entry that he had failed in proper time to assert, its action in that respect can not be questioned by the State. Within what time the settlement right shall be presented is one properly to be determined by the United States.

Reservations are not infrequently made of unsurveyed lands. Before survey what lands pass to the State by its grant are impossible of identification. It has always been the rule of construction of school land grants to the States that the right to any particular tract of land is not fixed until the tract is identified by the approval of the plats of survey. Congress knew of this established rule of construction, and had it intended that a different rule should apply to the grant here in question it would presumably have so declared in unequivocal terms. That the grant was not one of the specific tracts, but of quantity to be filled from certain sections, if undisposed of before survey, and was subject to amendment and change by later legislation, was early held by the Department, and that construction has been adhered to. In instructions of April 22, 1891 (12 L. D., 400, 403), referring to the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, after discussion of the principles involved, Secretary Noble held that:

In view of all the facts and circumstances herein set forth, I have no hesitation in concluding that the provisions of the prior act of February 22, 1889 [Secs. 10 and 11 in question], in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes, as amended by the later

act of February 28, 1891, are superseded by the provisions of said sections as amended, and that the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

And (ib., 401) it was held that:

It is now [by act of 1891] provided in substance: that where settlements are made before survey which are found to have been made upon sections sixteen or thirty-six, those sections shall be subject to the claim of such settlers, and that the State or Territory shall have indemnity for such lands. Indemnity is also provided where such sections "are mineral lands or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

This construction is the basis of the decisions in *State of Washington v. Kuhn* (24 L. D., 12, 13), *Todd v. State of Washington* (24 L. D., 106), *Noyes v. State of Montana* (29 L. D., 695), instructions of August 9, 1904 (33 L. D., 181), and the decision in *Schumacher v. State of Washington* (33 L. D., 454). The rule will not now be overturned or disturbed, unless it be judicially held to be erroneous.

In *Heydenfeldt v. Daney Gold, etc., Company* (93 U. S., 634, 638), considering a similar act, in words of present grant, the court held:

It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Judge Sharswood, "to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction. *Gyger's Estate*, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.

Again (page 639), referring to the decision in *Schulenberg v. Hariman* (21 Wal., 44), the court observed that "in this instance words of qualification restrict the operation of those of present grant." This decision is cited by the court in *Hawaii v. Mankichi* (190 U. S., 213), as good authority in construction of statutes, and also in *Minnesota v. Hitchcock* (185 U. S., 399 and 400), to the construction of the school land grant to that State, showing that it is still regarded by the court as authority. As the words "surveyed or unsurveyed" nowise enlarged the grant beyond what similar acts without them have always been held to pass, the decision is applicable to the present case, and it is held that under the grant in question the State of South Dakota takes no vested interest or title to any particular land until it is identified by survey, and that prior to such identification the grant, as to any particular tract, may be wholly defeated by settlement, the State's only remedy in such cases being under the indemnity provision of the acts of 1889 and 1891, *supra*.

The motion therefore presents no cause to vacate, recall, or modify said decision, and is denied, and the decision is adhered to.

NORTHERN PACIFIC GRANT—LANDS CLASSIFIED AS MINERAL—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* FREI ET AL.

Lands classified as mineral under the provisions of the act of February 26, 1895, are not subject to selection by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 8, 1906. (F. W. C.)

The Department has considered the appeal by the Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company, from your office decision of February 24, 1904, holding for cancellation its selection of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Sec. 1, T. 43 N., R. 2 E., Cœur d'Alene land district, Idaho, made under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and also its selection of the NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of said section 1, made under the provisions of the act of March 2, 1899 (30 Stat., 993).

March 15, 1899, the Governor of Idaho made application for the survey of this township under the provisions of the act of August 18, 1894 (28 Stat., 372, 394). It does not appear, however, that publication was ever made as required by said act or that any selection or claim has been filed on behalf of the State to any portion of the lands here in question, and no further consideration need be given to the claim of the State to these lands at this time, if any it has.

June 21, 1901, while the land was yet unsurveyed, the Northern Pacific Railway Company filed its selection for the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of said section, under the act of July 1, 1898, *supra*, and on October 1, following, selected the remainder of the section under the act of March 2, 1899, *supra*. The plat of survey of the township was not filed in the local land office until August 21, 1903, and on September 11, and October 8, following, the railway company filed new lists conforming its previous selections above referred to to the lines of the public survey. At the time of the filing of the township plat, Samuel Frei presented a homestead application for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 1, and Thomas T. Ritter made similar application for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section. These applications were rejected for conflict with the prior selections above referred to. November 22, following, Frei and Ritter each presented duly corroborated affidavits, alleging settlements upon the land applied for,

Frei, July 9, 1901, and Ritter June 5, 1901; also that they had resided upon the lands since dates of settlement and made valuable improvements thereon, those of Frei being valued at \$500 and those of Ritter at \$300. They each requested hearings in order to offer proof in support of their allegations of settlement and improvement. In the disposition of the cases made in your office decision of February 24, 1904, it became unnecessary to act upon their request for hearings, it being held therein that the selections under the act of 1898 by the railway company should be canceled because the lands selected had been, in October, 1899, classified as mineral land by commissioners appointed under the act of February 26, 1895 (28 Stat., 683); which classification received departmental approval March 26, 1901, and was held to bar the selection in question. It was also held that, as the base given for the selection made under the act of March 2, 1899, was of lands outside the primary limits of the Northern Pacific land grant, although within the Pacific Forest Reserve, it did not furnish a sufficient base for the selection under said act. It was further noted that both Frei and Ritter claimed the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section, but action looking to a determination of their respective rights in and to said tract was postponed until the final determination of the railway company's claims under the selections in question. The company has appealed to this Department and filed a brief in support thereof.

With regard to the selections under the act of 1899, the questions raised are fully disposed of in the decision of this Department in the case of Northern Pacific Railway Company *v.* Mann (33 L. D., 621), and for the reasons therein given your office decision rejecting the selection under the act of 1899 is affirmed.

With regard to the selection under the act of July 1, 1898, it is admitted that the decision of your office is supported by paragraph 12 of the regulations issued under said act, dated February 14, 1899 (28 L. D., 103), which is as follows:

Subject to the limitations named in paragraphs 13 and 14, selections may be made from any public lands within a State into which the Northern Pacific railroad land-grant extends, surveyed or unsurveyed, not valuable for stone, iron or coal, not subject to valid adverse claim, and not occupied by a settler at the time of such selection; but odd-numbered sections within the Bozeman, Helena, and Missoula land districts in the State of Montana, and the Coeur d'Alene land district in the State of Idaho, which are also within the primary limits of said land-grant, can not be selected by or patented to the railroad claimant unless they have been finally classified as non-mineral under the act of February 26, 1895 (28 Stat., 683).

But it is earnestly contended that said regulation is not in harmony with the instructions and decisions of this Department under the act of February 26, 1895, *supra*, as found in 25 L. D., 446, and 26 L. D., 423, and the purpose of the present appeal is to secure a modification

of the regulations issued under the act of July 1, 1898, in the paragraph above quoted.

The portions of the instructions under the act of 1895, above referred to, specifically quoted in the appeal under consideration, relate to the purpose of said act of 1895, which was to facilitate the adjustment of the Northern Pacific land-grant by enabling the Secretary of the Interior to ascertain without delay, for the purposes of that adjustment, what lands within the limits of the grant to said company in the particular districts named in the States of Montana and Idaho, were mineral in character and for that reason excepted from the grant, and the effect of the mineral classification under said act with regard to the subsequent disposition thereof under the general land laws, it being held that such classification forever barred the land from the railroad grant but did not prevent other disposition of the land where subsequent investigation showed the tracts to be non-mineral in character. A careful examination of the instructions referred to furnishes no sufficient guide for determining the question at issue in the case under consideration.

The act of 1895, under which classification was made of the lands in question as mineral, by its first section authorizes and directs the Secretary of the Interior to cause all lands within certain specified districts in the States of Montana and Idaho, within the Northern Pacific land-grant—

to be examined and classified by commissioners to be appointed as hereinafter provided, with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands in said land districts, which upon examination shall be classified as provided in this act as mineral lands.

Again, section 7 of said act provides:

That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as nonmineral, as provided for in this act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be, by law and compliance therewith and by the said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Company in violation of the provisions of this act shall be void: *Provided*, That nothing contained in this act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company.

Other provisions of this act afford the company due and full opportunity to be heard in opposition to the mineral classification by

the commissioners named under the act before the final classification of the lands by the Secretary of the Interior. Any lands classified, however, as mineral under this act are forever excluded from the operation of the Northern Pacific land-grant. The provisions above quoted authorize and direct the Secretary of the Interior—

to reject, cancel and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the Northern Pacific Railroad Company on any lands in said land districts which, upon examination, shall be classified as provided in this act as mineral lands—

and declares void any patent issued to said Northern Pacific Railroad Company in violation of the provisions of said act.

It is claimed in the appeal under consideration that these provisions of the act of 1895 relate only to lands included in the original grant; that the act of July 1, 1898, is a separate grant in itself; that it provides a different rule of adjustment, in this, that under the original grant lands containing iron and coal were not excluded from the grant, while under the act of 1898 such lands are specifically excluded; also that the provisions of the act of 1898 have equal operation along the entire line of the Northern Pacific railroad and, as a consequence, that the provisions of the act of 1895, limited to certain districts in Montana and Idaho, do not apply.

The act of 1898, like other relief acts, was passed primarily for the protection of individual claimants as against the Northern Pacific land-grant, and provided for a speedy adjustment of conflicting claims within the Northern Pacific land-grant by first affording the individual claimant an opportunity to transfer his claim to other public lands of the character described or to retain the railroad lands formerly claimed, and in the latter event the railroad company was to be invited to relinquish all its right, title and interest in and to such land, whereupon it was to be entitled to select other lands in lieu of the land relinquished and patents were to "issue for the land so selected as though it had been originally granted." Under the scheme thus provided the lands selected took the place or were in lieu of the lands relinquished and claimed under the original grant and thus became, upon selection, a part of the original grant. This is made plain by the part of the act just quoted as well as by that further provision of the act which provides that—

nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted.

In paragraph 10 of the regulations issued under the act of 1898, in referring to that portion of the act just quoted, it is said:

Under the act of July 2, 1864 (13 Stat., 365), the railroad company became entitled to all the odd-numbered sections within the primary limits of the grant or to indemnity for such as were "granted, sold, reserved, occupied by

homestead settlers, or preempted, or otherwise disposed of," at the date of the definite location of its line of road. Thus the maximum quantity of lands to which the company was entitled is established by ascertaining the area included in odd-numbered sections within the primary limits of the grant as adjusted to the line of definite location. The clause in the act of July 1, 1898, providing against an enlargement of the quantity of lands to which the railroad company was then entitled has reference to the maximum quantity ascertained as aforesaid, and does not restrict the privilege of making selections under that act to those instances where the railroad claimant has an absolute legal right to the particular lands relinquished, a matter which would not be involved in an ascertainment of the quantity of the grant.

The general indemnity provisions found in the acts of July 2, 1864 (13 Stat., 365), and the resolution of May 31, 1870 (16 Stat., 378), limit selections to certain prescribed limits. The act of 1898 limits the selections to be made thereunder to certain states. Selections under the latter act are nevertheless indemnity and when made become a part of and are in partial satisfaction of the original grant.

The selection in question is not only on behalf of the Northern Pacific Railroad Company, being made by its successor in interest, but is primarily on account of the Northern Pacific land-grant, and in the opinion of this Department, any patent or evidence of title given to the Northern Pacific Railroad Company or its successor in interest, under a claim predicated upon the Northern Pacific land-grant, to lands classified as mineral under the provisions of the act of February 26, 1895, *supra*, would be void.

To permit the company to make selection of lands classified as mineral under the act of 1895, thus reopening the adjudication made under said act, would destroy all that was accomplished thereunder, and the fact that the act of 1898 is more restrictive in its provisions, excluding coal and iron lands, included under the original act, is no reason therefor. Had it been otherwise, *i. e.*, had the original act excluded coal and iron lands, and the act of 1898 permitted selection to be made for such lands, the company's position would have been much stronger.

Finally it is urged that under existing practice individual claimants to lands within the limits of the Northern Pacific land-grant are permitted, under the provisions of the act of 1898, to transfer their claims to lands classified as mineral under the act of 1895, and, as the language used to define the class of lands that may be selected by the railroad company under the act of 1898, and those to which the individual claimants may, under said act, transfer their claims, is the same, that equal opportunity should be afforded the railroad company to make selection of these lands. In answer thereto it is sufficient to say: first, that the individual claimant was not, like the railroad company, interested at the time of the classification and consequently was not afforded due and full opportunity to be heard

upon the question of the character of the lands prior to their final classification, and, second, that the exclusive provisions of the act of 1895 relate only to the Northern Pacific Railroad Company and those claiming under or through its land-grant.

The entire matter considered, the Department affirms your office decision and the selections in question will be canceled.

LAND IN INDIAN RESERVATION—LIEU SELECTION—ACT OF APRIL 21,
1904.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1906.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of April 21, 1904 (33 Stat., 189, 211), making appropriations for the current and contingent expenses of the Indian Office and for fulfilling treaty stipulations with the various Indian tribes for the fiscal year ending June 30, 1905, provides, *inter alia*—

That any private land over which an Indian reservation has been extended by executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant nonmineral, nontimbered, surveyed public lands of equal area and value and situate in the same State or Territory.

Preliminary to making relinquishment and selection of other lands under the provisions of the foregoing act, the owner of any private land over which an Indian reservation has been extended by executive order, must file with the Commissioner of the General Land Office an application addressed to the Secretary of the Interior, requesting that he be permitted to surrender the lands by him owned and to select other lands in lieu thereof, pursuant to the provisions of the act of April 21, 1904 (33 Stat., 211), conformable to the rules and regulations adopted by the Secretary of the Interior and subject to the exercise of the Secretary's discretion. The land proposed to be surrendered must be accurately described by legal subdivisions if surveyed, or in the event that it is unsurveyed by such designation as will readily enable the Commissioner of the General Land Office to identify it. There may accompany such application a brief, or argument, setting forth such reasons as the petitioner may see proper to offer, why the application to accept such land as a basis of selection under the aforesaid act should be entertained by the Secretary of the Interior. This petition, with report thereon, will be submitted by

the Commissioner of the General Land Office to the Secretary of the Interior. It will then be referred by the Secretary to the Commissioner of Indian Affairs for report as to whether the described lands are needed for the use of the Indians, and such recommendations as the Commissioner may deem proper. If the Secretary is of opinion, after considering the application, that it is inadvisable for the Government to acquire the title to the land described therein, under the provisions of the aforesaid act, he will deny the application.

If, however, the Secretary decides to entertain the proposition, subject to the further exercise of his discretion, he will so order, and thereafter selections may be made by the petitioner, or applicant, under the rules, regulations, restrictions, limitations, and conditions herein following:

PRIVATE LANDS SUBJECT TO EXCHANGE.

1. Private lands subject to exchange under the provisions of this act include all lands within the limits of an Indian reservation established by executive order, to which the right to a patent or its equivalent has been earned by full compliance with the laws of the United States governing the disposal of said lands.

RELINQUISHMENT OR RECONVEYANCE.

2. Relinquishment or reconveyance made in pursuance of this act must be executed and acknowledged in the same manner as conveyance of real property is required to be executed and acknowledged by the laws of the State or Territory in which the land is situated. Where the relinquishment or reconveyance is made by an individual it must show whether the person relinquishing is married or single; and if married, the wife or husband of such person, as the case may be, must join in the execution of the relinquishment or reconveyance in such manner as to effectually bar any right or estate of dower, curtesy, or homestead, or any other claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State or Territory in which the relinquished land is situated such wife or husband has no interest whatever, present or prospective, which makes her or his joinder in the relinquishment or reconveyance necessary. Where the relinquishment or reconveyance is by a corporation it should be recited in the instrument of transfer that it was executed pursuant to an order, or by the directions of the board of directors or other governing body, a copy of which order or direction should accompany such instrument of transfer which must follow in the matter of its execution strictly the laws of the State or Territory in which the land is situated relating to corporate conveyances, and should bear the impress of the corporate seal.

ABSTRACT OF TITLE.

3. Each relinquishment or reconveyance must be accompanied by a duly authenticated abstract of title showing that at the time the relinquishment or reconveyance was executed the title was in the party making the same, and that the land was free from conflicting record claims, tax liability, judgment or mortgage liens, pending suits, or other incumbrances.

AUTHENTICATION OF ABSTRACT.

4. The certificate of authentication of the abstract must be signed by the recorder of deeds under his official seal and must show that the title memoranda is a full, true, and complete abstract of all matters of record or on file in his office, including all conveyances, mortgages or other incumbrances, judgments against the various grantors, mechanics, or other liens, *lis pendens*, and all other instruments which are required by law to be filed with the recording officer, affecting in any manner whatsoever the title to the described land. The custodian of the tax records must certify that all taxes levied or assessed against the land or that could operate as a lien thereon have been fully paid and that there are no unredeemed tax sales and no tax deeds outstanding, as shown by the records of his office. The absence of judgment liens or pending suits against the various grantors which might affect the title of the land relinquished or reconveyed, must be shown by the official certificates of the clerks of all courts of record whose judgments under the laws of the United States, or the State or Territory in which the land is situated, would be a lien on the land reconveyed or relinquished, without being transcribed other than on the court records.

LANDS SUBJECT TO SELECTION.

5. Selections under the provisions of this act are restricted to surveyed, nonmineral, nontimbered, vacant unreserved public lands situated in the same State or Territory as, and equal in area and value to, the lands relinquished.

SELECTIONS.

6. Selections must be made by the owner of the land relinquished or in his name by a duly authorized agent or attorney-in-fact; and when made by an agent or attorney-in-fact proof of authority must be furnished.

APPLICATIONS TO SELECT.

7. Applications to select hereunder must be filed in the proper local land office and must specifically describe the land desired to be

surrendered and that sought to be selected, the county and State, or Territory, as well as the Indian reservation, and the land district wherein situated must be given of the land relinquished. It must, in each instance, be represented that the applicant is the owner of the land relinquished and that he desires to surrender the same to the Government and select in lieu thereof public lands under the provisions of the act of April 21, 1904 (33 Stat., 211); that the land surrendered and that selected therein described are of equal area and value; that the land selected is nonmineral, nontimbered, vacant and unoccupied public land; that the applicant will, without cost to the Government, place the deed of relinquishment of record and extend the abstract of title to the date of the recordation thereof upon being notified so to do by the land department; and that upon the request of the Secretary of the Interior he will deposit with him a reasonable amount of money to enable the Secretary to investigate and determine the legality of the selection.

8. The application must be accompanied by a deed of relinquishment or reconveyance to the land tendered as the basis of exchange, duly executed, and a properly authenticated abstract of title to the land, by the required commissions, and proof that the relinquished land and that selected are equal in area and value; that the selected land is nonmineral, nontimbered, vacant and unoccupied adversely to the selector therein; that the land relinquished and offered in exchange has not been made the basis of another selection, and that the land applied for is not situated within a mineral township nor within six miles of a mining claim, or in default of the showing last mentioned, a request for notice of publication must be made, etc., and satisfactory evidence that the Secretary has, subject to the further exercise of his discretion, entertained the selector's preliminary application to reconvey the basis land and select other lands in lieu thereof.

9. The affidavit or affidavits to support a selection under this act must be made by the selector or by some credible person possessed of the requisite personal knowledge in the premises, and may be executed before any officer qualified to administer oaths, and must be corroborated by at least one person who has no personal interest in the exchange and who is familiar with the character and condition and value of the land selected and the value of the land relinquished. This affidavit or affidavits, fully corroborated, must show that the land selected is nonmineral and nontimbered in character; that it contains no salt springs or deposit of salt in any form sufficient to render it chiefly valuable therefor; that it is not in any manner occupied adversely to the selector; that it is not situated within a mineral township or within six miles of a mining claim, and that *the lands selected and the lands relinquished are equal in area and*

value, and are situated in the same State or Territory. The selector may post and publish notice of his application in lieu of the showing as to the mineral character of the township and the proximity of mining claims.

10. Forms of application for selection under this act and accompanying affidavits as to relinquished and selected land, as set out hereinafter in these instructions, or their equivalents, should be used. All proofs and papers necessary to complete a selection must be filed at one and the same time, except as herein otherwise specially provided.

PUBLICATION.

11. Where the land in the application to select is within six miles of a mining claim or within a mineral township, or if the applicant fails to show that the land is not within a mineral township nor within six miles of a mining claim, you will require the applicant, within twenty days from the filing of his application, to begin publication of notice thereof at his own expense in a newspaper to be designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the application must be posted in the local land office and upon each and every non-contiguous tract included in the application.

12. The notice should describe the land applied for and give the date of application, and state that the purpose thereof is to allow all persons claiming the land under the mining laws, or desiring to show it to be mineral in character, an opportunity to file objection to such application with the local officers of the land district in which the land is situate and to establish their interest therein or the mineral character thereof.

13. Proof of publication shall consist of an affidavit of the publisher, or of the foreman or other proper employee, of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land, and that such notice remained posted during the entire period required, shall be made by the applicant or some credible person having personal knowledge of the fact. The register shall certify to posting in his office. The first and last dates of such publication and posting shall, in all cases, be given.

MISCELLANEOUS.

14. Owners of lands over which an Indian reservation has been extended by executive order will not be permitted to make selection for noncontiguous tracts in lieu of compact bodies of land situated within such reservations, and all rights of selection based upon lands situated within the same section shall be restricted to one section.

Any attempt on the part of the owner of land within a reservation to avoid this rule by making surrender to the Government by separate deeds or by a sale of part of the land to another person after the approval of these regulations will defeat the proposed transfer.

15. Fees must be paid by the applicant at the time of filing his application in the local land office at the rate of \$1 each to the register and receiver for each 160 acres or fraction thereof included in his application.

16. Selections made under this act will not be passed to patent until after four months following the filing of the application in the local office. This is to enable any person claiming an adverse right to the selected land to have full opportunity to regularly assert said right.

17. The land relinquished and the land selected must be, as nearly as practicable, equal in area, but the rules of approximation obtaining in other classes of entries will be observed.

18. Applications to select under the provisions of this act will not defeat the right of the Secretary of the Interior or of the President of the United States to withdraw or reserve the land for such proposed public purposes or uses as they may deem proper prior to the approval of the selection by the Secretary of the Interior, and the Secretary, acting within the exercise of his discretion, may reject any and all applications at any time prior to final approval of the same for any reason appearing to him good and sufficient, notwithstanding the application may have been received and certified by the local office and recommended for approval by the Commissioner of the General Land Office, but all asserted rights, based upon application or settlement subsequent to the filing of applications under the provisions of this act with the register and receiver, will be held subject thereto, and suspended pending the final determination thereof.

PRACTICE.

19. Notices of additional or further requirements, rejections or other adverse actions of registers and receivers, the Commissioner, or the Secretary will be given, and the rights of appeal, review, or rehearing recognized in the manner now prescribed by the rules of practice, except as herein otherwise provided.

20. If application to contest or a protest or other objection shall at any time be filed against the selection or the application to select, you will forward the same to this office for its consideration and disposition.

21. Applications to enter filed subsequent to and in conflict with applications to select under this act will be suspended by you and held to await the final disposition of the application hereunder except where such subsequent application to enter is supported by allegations

of prior right, in which event you will transmit the conflicting application to enter to this office.

22. Applications presented to your office under the provisions of the foregoing act, not in substantial compliance with the requirements herein made, or not accompanied by the prescribed proofs, or if the land offered as a basis of exchange is not situated within the boundaries of an Indian reservation created by executive order, will be rejected by you. All applications sufficient in form, accompanied by the required proofs, will be accepted for transmission as hereinbefore provided, and you will note on your records against the land: "Application of ———, act April 21, 1904, pending." The register will certify the condition of your records on the applications, and you will transmit the papers to this office unless publication is necessary, in which event you will forward the record promptly after the filing of the proofs thereof in your office.

23. The Commissioner will, upon the receipt of an application to select under the provisions of this act in the General Land Office, cause the same to be examined, and if, in his judgment, the rules and regulations have been complied with he will transmit the records to the Secretary with his report and recommendation. If, however, the Commissioner finds that the selection is defective or that the rules and regulations have not been complied with, he will reject the selection or require further proofs.

24. If upon examination of an application to select under this act the Secretary decides that it should be allowed, the applicant will be required to have his relinquishment recorded in the manner prescribed by the State or Territory where the land is situated, and to have the abstract of title extended down to and including the date the deed of relinquishment or conveyance was recorded.

25. If the Secretary be of opinion that further evidence as to value and character of the land involved is necessary, he may institute such an inquiry as he may deem advisable, and may require the applicant to deposit a sum of money to defray the expense of the investigation. In any case where deposit shall be required to defray the expense of an investigation it will be made with the Secretary of the Interior, to be held and disbursed by him or under his directions.

26. If the Secretary approve the proposed exchange the Commissioner of the General Land Office will, as soon as practicable, after the receipt of the advice of such approval, make suitable notations on the records of his office and notify the local office wherein the selected land is subject to disposal thereof. The Commissioner in his letter to the local office will require that the applicant be notified of the approval of his application, and informed that he will be allowed sixty days in which to place the deed of reconveyance or relinquishment of record and to extend the abstract of title down to and includ-

ing the date of the recordation of such deed, and that he be further advised that in default of action within the time specified the application will be finally rejected without further notice.

27. Approvals by the Secretary of the Interior will be subject to and conditioned upon the *bona fide* compliance on the part of the applicant with all the regulations and requirements herein or which may, by direction of the Secretary of the Interior, be hereafter promulgated.

THE SECRETARY'S DISCRETION.

28. The Secretary of the Interior may, in the exercise of the discretion in him vested by law, withhold his approval from any application made under the provisions of this act, although the applicant may have complied with the rules and regulations herein prescribed. Owners of land situated within the boundaries of Indian reserves, created by executive order, are hereby specifically informed that if, in the opinion of the Secretary, the approval of any application, made under the provisions of this act, would be inimical to the public interests, such application will be rejected.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

4—088.

SELECTION IN LIEU OF LAND IN ——— INDIAN RESERVATION.

(Act April 21, 1904.)

To the Register and Receiver, United States Land Office,

GENTLEMEN:

I am the owner of the ——— Meridian, containing ——— acres; said land is situated in the County of ———, State of ———, within the boundaries of the ——— Indian Reservation, and is located within the ——— land district; I desire to relinquish and reconvey said lands to the United States and in lieu thereof to select the ——— land district, State of ———, containing ——— acres, under the provisions of the act of April 21, 1904 (33 Stat. 211).

In compliance with the regulations under said act I have made and executed a deed of reconveyance to the United States of the tract first above described situated within the said ——— Indian Reservation, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted, and I do hereby bind myself and promise to have said deed placed of record and the abstract of title duly extended to the date of the recordation of such deed without cost to the United States upon receipt of notice from the Land Department that I am required so to do. I further agree that I will deposit with the Secretary of the Interior, upon

demand, a reasonable sum of money to be by him expended in investigating the *bona fides* of this application.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from incumbrance of any kind; also an affidavit, duly corroborated, showing the land selected to be nontimbered and nonmineral in character and unoccupied, and that the lands surrendered and the lands selected herein described are equal in area and value. I therefore ask that, subject to the approval of the Secretary of the Interior, a United States patent issue to me for the tract or tracts herein selected.

Dated, _____

LAND OFFICE AT _____
_____, 190—

I, _____, Register of the land office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

_____,
Register.

Selection approved by the Secretary, _____, 190—.

Approved by the Commissioner, _____, 190—.

Approved for patent, _____, 190—.

4—089.

AFFIDAVIT FOR SELECTIONS.

[Under act of April 21, 1904 (33 Stat., 211).]

INDIAN RESERVATIONS.

[To be made by the selector, or other credible person cognizant of the facts, before an officer authorized to administer oaths. Before being sworn, affiant should be advised of the penalties of a false oath.]

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

_____,
_____, 190—.

_____, being duly sworn according to law, deposes and says that he is a citizen of the United States, and that his post-office address is _____; that he is well acquainted with the character, condition, and value of the following-described land, and with each and every legal subdivision thereof, having personally examined the same, to wit:

that his personal knowledge of said land enables him to testify understandingly with respect thereto; that there is not, within the limits of said land, any known vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper; that there is not, within the limits of said land, any known deposit of coal, or any known placer deposit, oil, or other valuable mineral; that said land contains no salt springs, or known deposits of salt in any form, sufficient to render it chiefly valuable therefor; that no portion of said land is

claimed for mining purposes under the local customs or rules of miners, or otherwise; that said land is essentially nonmineral in character, has upon it no mining of other improvements, and is not in any manner occupied adversely to the selector; and that the selection thereof is not made for the purpose of obtaining title to mineral land. Affiant further says that he is well acquainted with the value of the hereinafter described land, having frequently passed over the same, and that from personal observation and knowledge he states that the lands hereinbefore and hereinafter described are of equal value; ----

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ----), and I verily believe him to be a credible person and the person he represents himself to be; and that this affidavit was subscribed and sworn to before me at my office in ----, on this ---- day of ----, 190--.

NOTE.—It must also be shown by affidavit or otherwise whether the selected land is within six miles of a mining claim.

DESERT LAND ENTRY—ANNUAL EXPENDITURE.

STEVENSON *v.* SCHARRY.

The annual expenditures upon a desert land entry, and proof thereof, required by the act of March 3, 1891, are for the information of the land department and as evidence of the good faith of the entryman, and a contest for default of such proof may be defeated by the filing of proof subsequent to the initiation of the contest, but prior to final action thereon, showing that the requisite annual expenditure has in fact been made.

The desert land law requires an annual expenditure of one dollar per acre for each acre embraced in the entry, for the first, second and third years, but does not require that the first or any other annual expenditure shall effect reclamation of any part of the land, the sole requirement in that respect being that the land shall be reclaimed within the period allowed therefor.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 9, 1906.* (J. R. W.)

John Scharry filed a motion for review of departmental decision of March 25, 1905 (unreported), cancelling his desert land entry for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 7 N., R. 31 E., Walla Walla, Washington, in the contest of William Stevenson against him. Such motion, for cause shown, was entertained, and with brief thereon has been served and responded to and the record is now before the Department for its final action.

There is no substantial controversy upon any question of fact. Scharry's entry was made April 29, 1902. July 25, 1903, Stevenson filed a contest affidavit charging (1) failure of Scharry to expend one dollar per acre or any sum in improving the land since the entry, and (2) failure to make annual proof within the time required.

September 16, 1903, a hearing was held at the local office in which both parties fully participated. The evidence disclosed that Scharry had purchased of the Walla Walla and Columbia Irrigation Company, in February, 1903, a water right for this land, agreeing to pay therefor \$1,600 and a yearly rate of \$1.50 per acre. One hundred dollars was then paid. The company on its part agreed and obligated itself to furnish for the land one-twentieth of a cubic foot of water per second continuously from April 15 to October 15. The contract was not formally signed by the company until July 29, 1903. The evidence showed that the Water Company located its ditch in 1892 or 1893 and relocated it during the summer of 1903; that it had expended between \$19,000 and \$20,000 in construction of a ditch over eight miles long from its proposed intake to within three miles of the land. When this was done is not shown by the record. No diversion dam had been constructed nor could water be turned into the ditch until such work should be done and flumes be constructed for crossing depressions of ground intersecting the course of the ditch. The proposed expenditure for completion of the project was between \$75,000 and \$100,000. The annual proof required of the entryman was not filed until the day of the hearing. The local office was of opinion that the default of annual proof was not of itself fatal to the entry. Upon the second ground of contest the local office found that—

the purchase of a contract for a water right and the payment of one hundred dollars on the same might be considered as an improvement within the intent of the law, if the said company were an actual *bona fide* company, with irrigating ditches, reservoirs, laterals, etc., in operation, from which to supply water to said land. In proof of expenditures, such as is submitted in this case, it devolves upon the entryman to show affirmatively whether or not said company has to sell, or is able to deliver, the water to irrigate said lands, as per the terms of said contract. This he has failed to do. There are many irrigation schemes, and prospective irrigation projects in this part of the country. These usually consist of preliminary surveys, with the hope of securing capital to build ditches through the country, but it does not follow that each of these companies, with the very remote possibility of ever getting water, or of building a ditch at all, has anything of value to sell.

We are of the opinion that in this case the Walla Walla and Columbia Irrigation Company has no water right to sell. Therefore Mr. Scharry's contract is of no value.

Your office held the entry for cancellation for default of annual proof, citing *Hochwart v. Maresh* (31 L. D., 276) and *Andrew Clayburg* (20 L. D., 111) as authority therefor, and such action was

affirmed by the Department. The local office clearly held that default of annual proof was not of itself sufficient cause for cancellation of the entry if the requisite annual proof is in fact filed before its final action upon the entry, but recommended cancellation of the entry because there was no present ability of the irrigation company to perform its contract. This holding was not adhered to by your office and the cancellation was based upon the default of annual proof.

The desert land act as amended March 3, 1891 (26 Stat., 1095), provides, among other things—

That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second—and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled.

The original desert land act (19 Stat., 377) gave a period of three years for reclamation without requirement of annual expenditure or proof of it. Section five, above quoted, added by the act of 1891, required proof of annual expenditures in efforts to effect reclamation and imposed a forfeiture in default of such expenditure and proof. The proper construction of the act therefore is, that the requirement for annual expenditure and of proof of it is for information of the land department of the good faith of the entryman and to prevent long segregation of lands so entered where no diligence is shown in matters of reclamation. This being the evident purpose of the provision, the essential thing is diligence and good faith rather than the actual formal proof of it.

In Andrew Clayburg (20 L. D., 111), referring to this section, it was held that—

This makes the failure to file this testimony during any year as the ground upon which his entry may be canceled, and in every case where there is a total failure to file such testimony during any year after a desert declaration has been filed, upon information of such failure, your office clearly has full and complete jurisdiction to proceed, under rules of practice, against such entry and to finally cancel the same for such failure. * * * In other words, the

filing of the yearly testimony showing the expenditure of the requisite amount on the land is all that is required to show full compliance with the law.

The intent of the act as requiring evidence of good faith, and the interlocutory character of such proofs and of the proceedings thereon is the clear general purport of that decision.

In *Hochwart v. Maresh*, *supra*, your office held that a charge of default in filing proof of annual expenditure upon a desert land entry did not state a cause of action and this ruling was reversed by the Department upon authority of *Andrew Clayburg*, *supra*. That decision however did not go to the extent of holding that default in filing of final proof necessitated cancellation of the entry if the requisite annual expenditure had been in fact made, and formal proof of it was tendered. The report in the latter case indicates that it was substantially *ex parte*, as the case came to the Department upon contestant's appeal and no service had been made, though service by publication was attempted. It did not show that the requisite annual expenditure had been made and that the default was merely in the formal proof of it and that formal proof was in fact later tendered.

The right of a contestant under the act of May 14, 1880 (21 Stat., 140), does not attach until the final successful result of his contest. *Strader v. Goodhue* (31 L. D., 137); *Emma H. Pike* (32 L. D., 395); *McCraney v. Heirs of Hayes* (33 L. D., 21). The preference right is in the nature of a reward to an informer and is intended to prevent fraudulent appropriation of public lands. Pending the adjudication of a proceeding in the land department there is full jurisdiction to recognize and adjust the equities of the entryman. *Williams v. United States* (138 U. S., 514, 524); *Strader v. Goodhue*, *supra*; *McCraney v. Heirs of Hayes*, *supra*. The case last cited is strictly analogous to the one at bar, final proof being allowed after initiation of a contest for default of such proof. The local office held correctly on that branch of the present case. A contest for default of annual proof may be defeated by proof subsequent to its initiation but prior to final action therein, that the requisite annual expenditure was in fact made, and the motion for review is well grounded in this respect.

As to the first ground of contest the local office erred. The law requires merely annual expenditure to the requisite amount, in good faith for purpose of reclamation. It does not require that the first or any other annual expenditure shall effect reclamation of any part of the land. His expenditure must be honestly intended to effect reclamation of the land, but the sole further requirement is that the tract shall be reclaimed within the time allowed. There was but one witness to support the charge. He testified, among other things—

I know what he [the entryman] has been doing part of last year. Part of the time he has been out with the engineers on the ditch. . . . They were running the lines over the ditch both with a level and by a transit—in the vicinity of

the land, yes sir. . . . I don't know that he was working to get water on it, I suppose he was though. He was out with the engineers running over the ground—the ditch.

He further testified that the contestant knew such fact of the entryman's efforts and told him of it. The entryman and another witness testified to the same facts in substance and to the fact of the contract, the payment of \$100, the doing of work on the ditch, and that he had further, at expense of several hundred dollars, endeavored to interest persons in Seattle and elsewhere to invest capital in the canal project, among whom he names Dr. Smith, State Senator Kinnear, Mr. Hallenbeck, Mr. Phillips, Mr. Cameron, "and various other parties," whom he had taken over the ditch line. In view of the Department this evinces good faith, and actual expenditure to the requisite amount being shown, the entry is entitled to stand intact subject to the entryman's future compliance with the law.

The Department decision herein is therefore recalled and vacated, the action of the local office and decision of your office are reversed, and the contest is dismissed.

RIGHT OF WAY—TELEPHONE AND TELEGRAPH LINES—SECTION 3, ACT OF MARCH 3, 1901.

OPINION.

The approval by the Secretary of the Interior of the plats of incorporated cities and towns in the Indian Territory operates as a dedication of the streets and alleys thereof to public use, and thereafter, the Indians no longer having any interest in the ground embraced in such streets and alleys, the Secretary of the Interior has no authority to subject them to the terms of section 3 of the act of March 3, 1901, authorizing him, among other things, to grant rights of way for the construction of telephone and telegraph lines within and through incorporated cities and towns in the Indian Territory.

Assistant Attorney-General Campbell to the Secretary of the Interior,
June 9, 1906. (G. B. G.)

By reference of the Acting Secretary, I am asked for opinion "as to whether rights of way in the nature of an easement should be granted by the Department for the construction of telephone lines within incorporated cities and towns in the Indian Territory after the approval of the town plat, after the streets and alleys of such towns have already been dedicated to public use, and whether general damages should be assessed against such lines constructed after the approval of the town plat."

The phrase in this question as propounded—to wit: "rights of way in the nature of an easement"—indicates that reference is had to section 3 of the act of March 3, 1901 (31 Stat., 1058, 1083). This section authorizes the Secretary of the Interior—

to grant a right of way in the nature of an easement for the construction, operation, and maintenance of telephone and telegraph lines through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation.

A further provision is, that "the compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct."

I am of opinion that the approval of the plats of these towns within the Indian Territory by the Secretary of the Interior operated as a dedication of the streets and alleys therein to public use. This view has heretofore been expressed by the Department in letter of August 18, 1900 (I. T. D. 2606-1900), and in an opinion of February 2, 1905, I expressed a substantially similar view upon a kindred matter (see 19 Opinions, Assistant Attorney-General, 86, 87). This being true, it results that upon the approval of such plats all interest of the Indians in the streets and alleys of these towns terminated and the ground ceased to be such as the Secretary of the Interior is authorized to subject to the terms of the act of March 3, 1901, *supra*.

Legislative policy is in accord with this view of the law, as is evidenced by a provision in the act of April 26, 1906 (Public—No. 129), that "all municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners."

I advise you therefore that the Secretary of the Interior is not authorized to grant rights of way for the construction of telephone lines within incorporated cities and towns in the Indian Territory after the approval of the town plat, and necessarily that general damages in the nature of compensation to the Indians may not be assessed against such lines constructed after such approval and dedication.

Approved:

E. A. HITCHCOCK, *Secretary*.

APPLICATION TO AMEND—OATH—OFFICER.

SCHUYLER C. RENEAU.

An application to amend a homestead entry, as well as all affidavits filed in support thereof, should be executed before some officer designated by section 2294 of the Revised Statutes and the acts of March 11, 1902, and March 4, 1904, amending that section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 11, 1906.* (E. O. P.)

Schuyler C. Reneau has appealed to the Department from your office decision of October 13, 1905, rejecting his application to amend his original homestead entry, made August 6, 1904, for the SW. $\frac{1}{4}$, Sec. 19, and NW. $\frac{1}{4}$, Sec. 30, T. 19 N., R. 36 W., containing 325.06 acres, to include in lieu of said tracts, the N. $\frac{1}{2}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 33, and S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 28, T. 20 N., R. 37 W., Broken Bow land district, Nebraska.

At the time said application to amend was filed a portion of the land therein described was embraced in the soldiers' declaratory statement filed by Charles H. Bunemann, which was subsequently rejected by the local officers as to part thereof because the tracts described were non-contiguous. After the rendition of the decision now under consideration, Bunemann withdrew his appeal from the decision of the local officers and directed that his declaratory statement be held for naught. The record was thus cleared of any prior claim which might have been asserted by Bunemann to the tracts in conflict with the amended application of Reneau and leaves for determination at this time only the questions presented by the amended application of Reneau.

Your office, in rejecting said application, held:

From the facts stated it appears that Bunemann was the prior applicant for the tracts in conflict, and Reneau's application does not conform to the regulations governing amendments (see page 18, general circular of January 29, 1904), it not appearing from the showing made that the land applied for is that which was originally intended to be entered.

The Department is of opinion that at the time your office decision was rendered the application of Reneau to amend could not have been accepted as to the land in conflict, then covered by the declaratory statement of Bunemann, but this objection has been removed by the withdrawal of the claim of Bunemann for the tracts in conflict.

The matters set forth in the affidavit filed in support of the pending application fail to clearly show that the land now applied for was the land examined by Reneau prior to the time he made his original entry. His original entry included but approximately half the area now applied for and it is difficult to believe that Reneau did in fact examine all the land described in his present application, prior to making the entry he now asks to amend.

The report of the local officers required by departmental circular of January 11, 1889 (8 L. D., 187), was made prior to the withdrawal of the claim of Bunemann, and is too incomplete to be of service to the Department in passing upon the accuracy of the statements

contained in Reneau's affidavit. By said circular it is directed that the local officers—

transmit the application to this office with your joint report both as to the existence of the error, the diligence of the entryman, and the credibility of each person testifying thereto.

The Department is clearly of opinion an application to amend, as well as the affidavits filed in support thereof, must be executed before one of the officials designated by section 2294 of the Revised Statutes, and the acts of March 11, 1902 (32 Stat., 63), and March 4, 1904 (33 Stat., 59), and that Reneau's application and the affidavits, executed before a notary public, can not be accepted.

For the reason herein assigned, the action of your office is hereby affirmed.

MINING CLAIM—NOTICE—SECTION 2327, REVISED STATUTES, AS
AMENDED BY ACT OF APRIL 28, 1904.

FRANK G. PECK.

The provisions of the act of April 28, 1904, amending section 2327 of the Revised Statutes, relate exclusively to the question of, and are intended to prescribe the rule or guide whereby to determine, the subject-matter of mineral patents—that is, the particular tract actually conveyed by any such patent whenever the question may arise—and in no wise modify or affect any requirement of the mining statutes with respect to notice of an application for patent, nor can they have any effect to cure defects or irregularities in the notice of patent proceedings had in any case.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 13, 1906.* (G. J. H.)

November 5, 1889, patent No. 15322 issued to Joseph N. H. Irwin for the Nelson lode mining claim, Del Norte (then Lake City) land district, Colorado.

July 27, 1904, Frank G. Peck, claiming to be the present owner of the patented Nelson claim, filed in your office a petition for an amended survey and the issuance of a corrected patent for said claim, alleging in support thereof, among other things, in substance and effect, that the deputy mineral surveyor who made the survey upon which the patent is based erroneously described the claim as situated in Sec. 34, T. 41 N., R. 2 W., whereas it is in fact located in Sec. 34, T. 42 N., R. 1 W., N. M. P. M., and that he also made a slight error, both as to course and distance, in fixing the tie line connecting the claim with a corner of the public surveys.

September 9, 1904, your office authorized Peck to make application for an amended survey of the claim, which he did, and amended survey was made in October, 1904. Upon receipt of the field notes and

plat of the amended survey, which show the claim to be actually located in T. 42 N., R. 1 W., instead of in T. 41 N., R. 2 W., N. M. P. M., and also show that the tie line connecting the claim with a corner of the public surveys, as fixed by the former survey, is slightly in error both as to course and distance, your office, by decision of March 13, 1905, held that—

The showing establishes the contention of the claimant and you will now advise him that he will be permitted to republish and repost notice of application for patent for the statutory period and furnish proof thereof. This is necessary because of the fact that the land actually claimed is situated eight or ten miles from the land previously published for. Upon the completion of said publication and posting, the claimant may submit proof thereof, surrender the erroneous patent, accompanying the same by a reconveyance of the land covered thereby to the United States and an abstract of title brought down to date, whereupon steps will be taken in the direction of the issuance of a new and correct patent, if all be found regular.

April 8, 1905, Peck filed motion for review of that decision, in so far as it required him to republish and repost notice of application for patent and furnish proof thereof. By your office decision of May 2, 1905, the motion for review was denied. Peck has appealed to the Department.

It is contended to support the appeal, in substance and effect, that the notice as posted and published in the original patent proceedings was sufficient, and that under the provisions of the act of April 28, 1904 (33 Stat., 545), amending section 2327 of the Revised Statutes, the claim as bounded by the lines actually marked, defined, and established on the ground by the monuments of the official survey upon which the patent grant is based should be deemed to be patented under the patent already issued, and that therefore a new patent correctly describing the claim according to the amended survey should issue without requiring reposting and republication of notice.

The notice as published and as posted in the local office, the field notes of survey, the final certificate of entry, and all papers in the record relating to the original patent proceedings in which the township and range are given, erroneously describe the claim as situated in township 41 north, range 2 west. No names of adjoining or near-by claims are given in the notice, it being stated therein: "Adjoining claims, if any, unknown."

The published notice of an application for patent should designate with substantial accuracy the situation of the applicant's claim on the ground, and—

should contain such matter as will inform a man of ordinary prudence having an interest in a mining location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim and thus assert and protect his rights as provided by section 2326, Revised Statutes. Hallett and Hamburg Lodes (27 L. D., 104, 108).

The notice in the present case, which, as before stated, describes the land as situated in a township and range other than those in which it is actually located, and which contains no mention of near-by claims or other matters which might indicate that the claim is located elsewhere on the face of the earth than at the point therein specified, can not be said to designate the location of the claim on the ground with substantial accuracy. That the notice as published and posted did not describe the true location of the claims with substantial accuracy is evidenced by the fact that, with a copy of the notice before it, the land department issued a patent purporting to convey a tract of land some eight or ten miles distant from the tract actually claimed and intended to be described in the notice. There was nothing in the notice to in any wise indicate that it was intended to apply to another and different tract than that which by its terms it purported to cover. So far as shown by the copy of the notice or from any other papers before the land department in connection with the original patent proceedings, the claim appeared to be located in township 41 north, range 2 west, and the land department could not do otherwise than issue patent on the record as it stood. No notice having ever been published describing the claim as it is actually located on the ground, obviously the land department would not be warranted to issue a patent therefor in lieu of the one heretofore issued, without first requiring posting and publication of proper notice, as required by law, with a view to giving possible adverse claimants an opportunity to assert and protect their rights.

As to the contention based upon the act of April 28, 1904, *supra*, it would appear to be sufficient to say that if the tract marked on the ground by the monuments of the official survey, though situated in a different township from that in which the tract actually described in the notice is situated, must be deemed to be embraced within the terms of and conveyed by the patent already issued, there would be no necessity for the issuance of a new patent. But has the act any application to this case? The section (2327) as amended reads as follows:

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of

such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

This section is a part of the general mining laws and should be construed, if possible, to harmonize with the other portions of such laws. Section 2325, also a part of the general mining laws, provides, among other things, that notice of the application for patent to a mining claim shall be published for a period of sixty days. The main purpose of publication of the notice is to apprise any one having an interest in a mining location conflicting with the one applied for that application is made for patent to the ground in conflict, and to afford him opportunity to assert and protect his rights in the manner provided by section 2326. To issue patent on a claim as to which notice has never been published might deprive adverse claimants, if any there be, of opportunity to assert and protect their claims in the manner provided by law. This the land department has no authority to do.

As the unambiguous terms thereof disclose, the amendatory provisions of the act of 1904 relate exclusively to the question of, and are intended to prescribe the rule or guide whereby to determine, the subject-matter of mineral patents; that is, the particular tract actually conveyed by any such patent whenever the question may arise. Those provisions in no wise modify or affect any requirement of the mining statutes with respect to notice of an application for patent; nor have they, nor were they intended to have, the effect to cure any defect or irregularity in the notice of patent proceedings had in any case. What has or has not actually passed by the outstanding Nelson patent is not the question here. The only question presented is, whether the notice already given would justify the issuance of a new patent, in lieu of the former, expressly embracing the claim as defined and described by the amended survey; and that question is above answered in the negative.

The decision of your office, as appealed from, is affirmed.

HOMESTEAD—SOLDIERS' ADDITIONAL—REISSUE OF LOST CERTIFICATE.

HERMAN C. ILFELD.

The mere fact that a certificate of additional right has issued in the name of the soldier under section 2306 of the Revised Statutes will not prevent him from selling and divesting himself of the right itself, of which the certificate is merely the evidence; and upon satisfactory showing of the loss or destruction of the certificate, it may be reissued and recertified in the name of the assignee entitled to the right.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 13, 1906.* (P. E. W.)

The Department has before it the appeal of Herman C. Ilfeld from your office decision of April 10, 1906, rejecting his application, as assignee, for reissue and recertification to him of the certificate of right issued to Henry Eaton, April 17, 1882, for his additional right under section 2306 of the Revised Statutes.

There is no question as to the validity of said additional right in Eaton and there is no dispute as to the facts in the case. It appears that your office at the time of the issue of the said certificate of right transmitted the same to Eaton's attorneys at Springfield, Missouri, who filed his application therefor, and that it was lost or destroyed in their office, and never reached Eaton. Seventeen years later, not knowing that said certificate had been issued, and supposing that his application therefor had been rejected, Eaton, on December 14, 1899, sold and assigned all his additional right under said section 2306 of the Revised Statutes, to Theodore F. Barnes, for \$120, and on December 22, 1899, he made a further sale and assignment of all his said right to said Barnes, the consideration being \$1.00. In the former assignment Eaton declared under oath that he had made no previous sale or assignment of his said additional right. In the latter it is declared that the assignment is made for the express purpose of "divesting Eaton of all right to make an additional entry, and to convey said right to the exclusive use of said Barnes." With said second assignment Eaton executed, and delivered to Barnes, his affidavit stating:

I have not made any prior application for an additional homestead entry under the provisions of section 2306 of the Revised Statutes of the United States nor has a certificate of right of entry been issued to me; and that I have not heretofore disposed in any manner of my right of entry granted by said section 2306 . . . and that I have this day assigned my said right of entry to Theodore F. Barnes.

On June 18, 1900, said Barnes assigned all of said additional right of entry to Herman C. Ilfeld, the appellant herein, who, on July 23, 1900, applied to locate the same upon the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 26, T. 8 N., R. 18 E., Santa Fe, New Mexico Territory.

August 4, 1900, said Eaton executed an instrument purporting to convey to John H. Howell all his interest in the lost certificate of right. The said instrument is not with the record, having been filed in your office by Howell and subsequently withdrawn by him, but a copy thereof is with the record, as "Exhibit A", attached to Ilfeld's present application, and identified by affidavits of said Howell and John M. Rankin, his attorney, who drafted the said instrument. Therein Eaton states that through certain attorneys of Springfield,

Missouri, he, in February, 1882, applied to your office for a certificate of right, but that "never having heard from his attorneys respecting his said application, he supposed that said application had been rejected," but that he had recently been advised of its issue and delivery to his said attorneys; that he had never seen the certificate nor had it in his possession; that he—

has never sold said certificate, nor his right thereto, nor his right to an additional entry, to any one whomsoever, but that he is, at the present time (August 4, 1900) the true and lawful owner of said certificate and right to an additional entry of 80 acres;

and that he—

hereby sells . . . and conveys to John H. Howell . . . all of the affiant's right, title and interest in and to the certificate herein described, and to his right to an additional homestead entry of 80 acres.

August 14, 1900, Howell filed the said affidavit and bill of sale in your office, together with his own affidavit stating that he was "the true and lawful owner of the soldiers' additional homestead certificate which was issued to Henry Eaton on the 17th day of April, 1882, for 80 acres," and by virtue thereof asked for the reissuance of said lost certificate and its recertification to himself under the provisions of the act of August 18, 1894 (28 Stat., 397).

This application was withdrawn by Howell on October 26, 1900, for the reason that he had learned of the said sale, on December 22, 1899, to Barnes of Eaton's additional right, alleged to be uncertified. By your office letter of November 13, 1900, all papers filed by Howell were returned to him and he transmitted Eaton's affidavit and bill of sale to Eaton's attorneys, receiving back the amount he had paid therefor. Howell and the local officers made affidavit to the foregoing facts showing the disposition made of Eaton's said affidavit and bill of sale to Howell, and the local officers thereupon requested that the lost certificate be reissued and recertified to Ilfeld, the appellant herein.

November 8, 1901, your office rejected Ilfeld's application to locate Eaton's assignment on the land described, on the ground that the said certificate of right issued to Eaton was outstanding and unaccounted for.

October 27, 1905, Ilfeld applied to your office for the reissue of Eaton's lost certificate and for its recertification to himself. This application was supported generally by a showing of the facts hereinbefore stated, and particularly by a copy of the affidavit and bill of sale from Eaton to Howell and by the affidavit of J. R. Milner, one of Eaton's said counsel at Springfield, Missouri, explaining how Eaton's said certificate was lost in his office and stating that the same never reached Eaton, and was never sold nor in any manner disposed of.

Your office having called for the original affidavit furnished Howell by Eaton, dated August 4, 1900, and in order to perfect Ilfeld's application, there was filed, on February 26, 1906, the affidavit of Howell, stating that the copy of Eaton's assignment to Howell attached to Ilfeld's application herein, as "Exhibit A," is a "true and full copy" and that the facts stated in Ilfeld's application are true to affiant's personal knowledge. Also the affidavit of John M. Rankin stating that he drafted said affidavit and assignment from Eaton to Howell, and conducted the negotiations between them and has personal knowledge of the facts; that said "Exhibit A" is a "rescript of a carbon copy of the original affidavit and bill of sale executed by Eaton on August 4, 1900, for the purpose of selling his lost certificate to John H. Howell," and that the original affidavit was returned to Eaton in order to secure the refunding to Howell of the money paid Eaton for his alleged right. The record also shows that with a view to still further strengthen Ilfeld's application and showing herein, a detailed statement in the form of an affidavit of all the foregoing facts was prepared by counsel for appellant and sent to said Eaton to be executed by him, that Eaton, refusing to execute the same unless and until he was paid the sum of \$120, transmitted the same to your office. Thereon is the endorsement: "If they would send the money, papers would be signed." Therewith he enclosed the check given him by said Barnes in payment for his said right, and his affidavit stating that he "did bargain" with Barnes's agent, "the sale being for add. Hd. 80 acres, untaken soldier's pre-emption," and—

that he now makes this affidavit for the purpose of setting aside the pretended sale to T. F. Barnes for the reason that he, said Barnes, has never made any payment for my right to said land as per agreement. He did send check for the amount claimed, \$120, which is enclosed.

Your office letter of December 16, 1905, in reply to the foregoing from Eaton, states that the said check has the following condition typewritten thereon:

His additional homestead, 80 acres, to be legal and accepted by U. S. Land Commissioner, reasonable time allotted for examination.

Your said letter advised Eaton, that—

it appears from the records of this office that you executed a complete assignment of your alleged additional right on December 14, 1899, in favor of Theodore F. Barnes in consideration of \$120, the receipt of which you acknowledged in said assignment . . . It appears . . . that a certificate of right was issued to you on April 17, 1882, and transmitted to Milner and Lisenby, at Springfield, Mo., and that said certificate was never located but is still outstanding and unsatisfied . . . Mr. Herman C. Ilfeld is now seeking to have said certificate, which is alleged to have been lost, recertified in his name, and, as a part of the evidence of his ownership he submits a copy of an affidavit executed by you on August 4, 1900, wherein you acknowledged to have sold to Mr. John H.

Howell of this city all of your right, title and interest in and to said certificate of right. In view of the foregoing it does not appear that you have any rights in the premises which this office has any power to protect.

It is clear from the foregoing that Eaton, in ignorance of the issue of said certificate of right, made a sale and assignment to Barnes which divested him of all right under said section 2306. This sale being prior to the transaction with Howell was not affected thereby even if the latter sale had not been revoked. There is, therefore, no right in Howell and no remaining right in Eaton which will impair or defeat the right sought to be asserted herein by Barnes's assignee. The mere fact that a certificate of right had been issued to Eaton could not prevent him from selling, and divesting himself of, the right itself, of which the said certificate was merely the evidence. If the certificate should be found and should prove never to have been otherwise disposed of, it would enure to the benefit of any one taking under Eaton's sale and assignment and the Department is unable to concur in the conclusions reached by your office that "the right which Mr. Eaton sold to Mr. Howell has been restored to him by his repayment to Mr. Howell of the purchase money" and that Eaton "is the owner of the additional right represented by the certificate." Eaton's repayment to Howell was in recognition of the fact that he was not the owner of the right and could not convey it to Howell. The applicant herein, Ilfeld, now stands in the place of Eaton and is invested with all the rights Eaton had before his sale to Barnes. The only question remaining for consideration is, therefore, whether the loss or destruction of the said certificate is sufficiently shown to justify the conclusion that it is not in existence and will not be presented. It was issued more than 24 years ago, was never in the possession of the beneficiary nor seen by him, and its disappearance is reasonably accounted for by a member of the law firm which filed Eaton's application therefor. This case is to be distinguished from that of Charles Tompkins, assignee of Lorenzo D. Findley (32 L. D., 246), which is relied on in the decision herein appealed from, wherein a certificate of right was by the beneficiary claimed to have been fraudulently procured and assigned without his knowledge. The Department said therein:

There is no sufficient evidence in the case to warrant a finding that the certificate was fraudulently procured, and there is not a particle of evidence to show that the certificate has been lost or destroyed.

It was held in that case that an application, by an assignee of the beneficiary named in said certificate of right for an additional entry in the face of the said certificate of right, could not be allowed upon the sole ground that the certificate had been outstanding for 25 years without being located or presented for recertification. In the present

case the recertification is asked by the assignee of the beneficiary named in the certificate who admits its issue and joins his counsel in explaining that it was lost or destroyed in their office without ever reaching him.

Upon careful consideration of the entire record, the Department is of the opinion that the non-existence of the said certificate of right is sufficiently shown to justify its reissue and recertification in the name of Ilfeld as assignee of the beneficiary named therein.

Your said decision is hereby reversed.

HOMESTEAD ENTRY—KINKAID ACT.

HENRY HOOKSTRA.

In determining the "extreme length" of a homestead entry under the "Kinkaid Act," the measurement should follow the lines of the public survey, and no entry should be allowed for any tract exceeding two miles either in length or breadth, and no application for an entry in as nearly compact form as possible should be rejected solely because its combined length and breadth or diagonal measurement exceeds two miles.

Where an entryman under the "Kinkaid Act" does not include in his entry the full area allowed by law, for the reason that there is no land subject to entry adjoining that entered, he may, if adjoining land thereafter become subject to entry, enlarge his original entry so as to include therein the full area allowed by law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 15, 1906.* (A. W. P.)

An appeal has been filed on behalf of Henry Hookstra from your office decision of December 18, 1905, rejecting his application to amend his homestead entry No. 18792, made June 28, 1904, for the SE. $\frac{1}{4}$, Sec. 8, S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 9, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, and the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 15, T. 27 N., R. 16 W., O'Neill, Nebraska, land district, so as to embrace, in addition thereto, the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, in said township and range.

It will be observed that Hookstra's original homestead entry, which contains four hundred and eighty acres, was made under section 1 of the act of April 28, 1904 (33 Stat., 547—commonly known as the "Kinkaid Act"), under which section, according to his showing as to qualifications, made in support thereof, he would have been entitled to make entry for the full area of six hundred and forty acres.

In support of the present application, filed at the local office August 28, 1905, Hookstra alleges, by affidavit duly corroborated, that at the time he made the original entry he was desirous of making as large an entry as possible under the act, but by reason of the con-

tiguous tracts of land having been taken by other persons, the four hundred and eighty acres were as large an area as he could then obtain; that at date of such entry he intended to initiate a contest against homestead entry No. 17535, made on May 16, 1902, by August Dreyer, for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, of said township 27 north, range 16 west, but upon examination of the records at the local office found that one J. D. McGinley had already, of date May 28, 1904, initiated a contest against the same, which was then pending and undetermined; that if he had taken such action he would have set out in an affidavit and filed with his homestead application that he did not elect to exhaust his homestead right by making entry of four hundred and eighty acres; that said McGinley failed to prosecute his contest, and because thereof it was dismissed on October 24, 1904; that on December 9, 1904, he (Hookstra) initiated a contest against the same, as result of which said entry was canceled by your office letter of July 11, 1905, notice of which he was given by the local officers on July 29, 1905; and that by reason of the cancelation of said entry so contested the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, which has at all times been vacant, is nearer his original entry than the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 15, for which reason he includes it in his present application, instead of the last described tract.

Your action in rejecting said application was based on the ground that—

The act of April 28, 1904 (33 Stat., 547), provides that entries shall be "as nearly compact in form as possible," and "in no event over two miles in extreme length."

Mr. Hookstra's application to amend his entry No. 18792 must be denied, for the reason that if the desired land were embraced in the entry, the form of same would violate the two-mile limitation contained in the statute.

It is now urged in support of the appeal that it was error to construe the words "extreme length" found in the act to mean the greatest distance between any two points of the tract composed of the entry and the land embraced in said application; and that by such construction the original entry would also exceed the two-mile limit as to length.

Considering this phase of the case, it appears that Hookstra's entry is two miles in length and three-fourths of a mile in breadth, while, with the land now applied for, the tract would remain the same length, but be one and a half miles in breadth. Hence the combined length and breadth of this tract would equal three and one-half miles. But, as now suggested on appeal, by the same process of reasoning the combined length and breadth of the original entry, would be two and three-quarters miles. Measuring diagonally from the extreme northwest to the southeast corners of the entire tract, it would also

exceed two miles, but this is likewise true as to the original entry. The Department, however, does not accept either of the above plans of measurement in determining the extreme length of an entry, as prescribed by the act in question. If such a plan were adopted where an entry embraced an entire section, the combined length and width would be two miles, and if it embraced one-half of two adjoining parallel sections, its combined measurement would be two and one-half miles, while by diagonal measurement it would also exceed two miles in length. But certainly an application embracing such a tract could not properly be rejected solely on the ground that it exceeded the two-mile limitation.

In determining the extreme length of an entry in contemplation of this act, therefore, the Department is of the opinion that the measurement must follow the lines of the public survey, and that no entry can be allowed for any tract exceeding two miles either in length or breadth, but also that no application for six hundred and forty acres in as nearly compact form as possible should be rejected solely because its combined length and breadth or diagonal measurement might exceed two miles.

Considering this application on the showing made in support thereof, it will be observed that technically it is not an application for amendment, but rather an application to enlarge the original entry so as to include additional adjoining land now vacant, but formerly embraced in the homestead entry of another, which was canceled as result of applicant's contest. While it has generally been held that the election of a qualified party, when filing for a homestead, to take less than the law allows him, is a waiver of his claim for a larger quantity, yet applications of this character have been allowed where through ignorance or misinformation the entryman has been misled as to his rights, and no adverse claim has intervened (Josiah Cox, 27 L. D., 389; Charles Carson, 32 L. D., 176); also where he had clearly disclosed his intention to so amend to include an adjoining tract, when he had cleared the record of an existing entry covering it. (Hadley v. Walter, 25 L. D., 276; Joseph Heisel, 26 L. D., 69; Daniel L. Hartley, *idem.*, 663; Green Piggott, 34 L. D., 573.) In the case of Ella Pollard (33 L. D., 110) it was also held, according to the syllabus, which appears to sum up correctly the doctrine announced therein, that:

Where a desert land entryman does not include in his entry the full area allowed by law, for the reason that there is no vacant land adjoining that entered which is susceptible of irrigation and reclamation, he may, if adjoining land of the character subject to desert land entry thereafter becomes vacant, enlarge his original entry so as to include therein the full area allowed by law.

The facts in this case are very similar and in all material respects the same as in the case at bar. While it is true that the former was

an application to amend or enlarge a desert land entry, yet the principle is the same, and there appears to be no good reason why it may not govern in the disposition of the case now under consideration.

In accordance with the views herein expressed, the decision of your office is reversed, and, in the absence of any other material objection, the application will be allowed.

**RIGHT OF WAY FOR TELEPHONE AND TELEGRAPH LINES—ACT OF
FEBRUARY 15, 1901.**

REGULATIONS.

Paragraph 54 of the regulations of September 28, 1905, requiring that all applications for rights of way under the act of February 15, 1901, for telegraph and telephone lines, must be accompanied by an official statement of the Post Office Department showing that the applicant has complied with the regulations under title 65 of the Revised Statutes, revoked.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 18, 1906.* (F. W. C.)

By letter from Acting Postmaster General, dated the 31st ultimo, the attention of this Department is invited to paragraph 54 of the regulations concerning right of way for canals, ditches and reservoirs, and for permission to use rights of way for telegraph and telephone lines, electric plants, etc., approved by this Department September 28, last (34 L. D., 212, 232), which provides that—

All applications for the use of a right of way under this act, through any lands designated therein, for telegraph and telephone purposes, must be accompanied by an official statement from the Post-Office Department showing that the applicant has complied with its regulations under title sixty-five of the Revised Statutes of the United States and amendments thereto.

This regulation is issued under the act of February 15, 1901 (31 Stat., 790), which authorizes the Secretary of the Interior to permit the use of rights of way through the public lands, forest and other reservations of the United States and certain named parks in California, for electric plants, poles and lines for the generation and distribution of electric power and for telegraph and telephone purposes, and for canals, ditches, pipes, and pipe lines, etc.

Attention is also invited to the filing in March, 1905, by the Standard Consolidated Mining Company, with the Post-Office Department, of its alleged acceptance of the restrictions and obligations of the act of Congress approved July 24, 1866, entitled, "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal and military purposes," and of acts amendatory thereof, which acceptance was evidently filed in furtherance of the requirement of paragraph 54 of the regulations above quoted.

With regard to said Standard Consolidated Mining Company, the letter from the Acting Postmaster General states:

It was stated by the company that it proposed to erect a telephone line in township 3 north, range 24 east, M. D. M., to be used entirely for private purposes, to connect the electric power house situated on Green Creek, which had been occupied by the company for twelve years preceding, with its storage system on the head waters of said creek; and that the line was to be about ten miles in length.

It was advised by the Assistant Attorney General for the Post Office Department that this corporation was not a telegraph company within the meaning of the act of 1866, *supra*, and not entitled to any of the benefits of that act; that the act of 1901 is not amendatory of the act of 1866, and that the Postmaster General was not required therefore to file the proffered acceptance. As authority for his conclusion, the Assistant Attorney General referred to the decision of the United States Supreme Court in *Richmond v. Southern Bell Telephone Company* (174 U. S., 761), and an opinion of the Attorney General published in volume 24 *Opinions of Attorneys-General*, at page 603.

Following the opinion thus expressed by the Assistant Attorney General, this Department declines to file alleged acceptances proffered by telephone companies of the benefits and obligations of the acts of 1866 and 1901, and, as will have been seen, such policy conflicts with the quoted regulations of the Department of the Interior, to the serious embarrassment of such companies.

I have the honor to suggest that this matter be taken up between the Department of the Interior and the Post Office Department for the purpose of arriving at some arrangement which will obviate the difficulty herein set forth.

By act of February 15, 1901, *supra*, it is provided:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the

provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

It will be seen that this act makes all permits given thereunder for telegraph and telephone purposes "subject to the provision of title sixty-five of the Revised Statutes of the United States and amendments thereto, regulating rights of way for telegraph companies over the public domain." It is clear therefore that any permit which might be obtained from this Department under said act would be subject to all the burdens of title 65 of the Revised Statutes, and this without regard to any action on the part of the applicant for the permit in the matter of filing with the Post-office Department of an acceptance of the restrictions and obligations of the matters included under title 65 of the Revised Statutes.

There is no question now before the Department as to the effect of the proviso to the act of February 15, 1901, as to the burdens imposed, nor any claim for benefits by reason thereof, and from a careful consideration of the entire matter the requirement of paragraph 54 of the regulations approved September 28, 1905, *supra*, seems to be unnecessary, and compliance with its conditions will not be longer exacted.

SETTLEMENT RIGHTS—ADVERSE POSSESSION—ESTOPPEL.

PETERSON *v.* PALMER.

One who fails to assert any claim to a tract of public land in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy, and improve the land, is estopped thereby from subsequently asserting a prior settlement right thereto in himself, notwithstanding the tract is found upon survey to be a part of the technical quarter-section upon which his improvements are located.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 18, 1906.* (J. L. McC.)

The plat of T. 26 N., R. 19 W., Kalispell land district, Montana, was filed in the local office on October 17, 1904.

On the same day Lulu Palmer made homestead entry for lots 6 and 7 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, in said township.

On November 17, 1904, Neils Peterson filed affidavit of contest against said entry, alleging prior settlement on the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 7, same township and range.

The land in dispute is the forty-acre tract constituting the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 6.

A hearing was had, at which it was shown that Miss Palmer settled on the land on August 20, 1902, by commencing the building of a house (on the NW. $\frac{1}{4}$ of said SW. $\frac{1}{4}$), in which she took up her residence as soon as it was finished, and continued to reside therein until the date of her entry. She made no improvements upon the forty-acre tract in controversy; but she testified that while work was in progress on her house—about August 22, 1902—her uncle, F. F. Stevens, posted notices on the land setting forth the extent of her claim. Inasmuch as counsel for the contestant express a doubt whether any notices were ever posted, or if so, that they were posted where any person would be likeley to see them, it may not be amiss to quote the testimony on this point—abbreviated by the omission of some needless verbiage:

There was no necessity for placing more than two notices up there any way because all the north and east is a rough country and nobody travels in there; but on the south side of this quarter, in going hunting they will go down that road, and turn off into the timber; so I went over near this southeast corner in question where there is a creek comes along, and there is a trail comes in along about there; and a few acres of open timber; and I thought it a most feasible place for a hunter to pass, so I stuck up a notice there stating how she had taken the land.

Q. Did that notice state that she claimed that forty among others?—A. Yes, sir, in a square, and warned them against trespassing; and then the other notice was put on a tree along the main traveled road.

Q. From your observation of the forty when you put up those notices, are you able to testify whether there was any person living on the land, or any improvements upon the same?—A. There was none whatever; there was nothing but an old trail.

In behalf of the contestant it is claimed that the forty-acre tract in controversy was first occupied, some time in the summer of May, 1902, by one John Tisdale; he remained about a year, and sold his improvements and possessory right to J. A. Folk; he, in January, 1904, sold to J. H. Parker; he, on May 3, 1904, sold his improvements to the contestant Peterson, who made a few more improvements upon the tract in controversy, in section 6, and built a house, in which he established residence, *in section 7*.

In view of the facts above set forth the local officers found and held:

We fail to find that the contestee ever established the corners or boundaries of the land claimed by her, to wit, the SW. $\frac{1}{4}$ of Sec. 6, or in any manner exercised any right of ownership over the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 6, but rather acquiesced in the acts of improvement performed by John Tisdale, the original locator of the disputed 40, and his successors in interest; that the contestee never established any possession or control either by act of location, settlement or improvement of SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 6, T. 26 N., R. 19 W.

We further find that Neils Peterson, successor in interest to Robert H. Parker, settled upon this disputed 40, together with other lands claimed by him

in Sec. 7, to wit, lots 1 and 2 and the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, said Sec. 7, in the month of May, 1904, and has since continued to reside upon and cultivate the same without any notice on the part of contestee or others of any adverse claim to the land claimed by him, and that by reason of such settlement, occupation, and improvement, the said Neils Peterson is the owner of the tract in dispute.

Miss Palmer appealed; and your office, on September 30, 1905, rendered a decision the gist of which follows:

It has been repeatedly held by the Department that settlement rests solely on acts performed *in person* by the party claiming the benefit thereof (see 8 L. D., 623; 13 L. D., 142; 26 L. D., 616). Whatever acts of settlement the party from whom Peterson purchased performed, could in no manner inure to the benefit of Peterson. Miss Palmer claimed, and had a right to claim, by reason of her settlement and residence, the entire SW. $\frac{1}{4}$; and as Peterson did not appear on the scene until two years afterward, it follows that Miss Palmer has the superior right to the land. Your decision is therefore reversed; the contest is dismissed; and the contestee's homestead entry will remain intact.

From this action the contestant has filed an appeal by his local attorney, supported by an argument from his resident attorney.

The appeal alleges that your office erred in holding that "the simple facts that are necessary to determine the issue in this case are that Miss Palmer settled on the SW. $\frac{1}{4}$ of Sec. 6 in August, 1902, and has resided there to the date of her entry."

The appeal does injustice to your decision by isolating a single sentence, and omitting to quote the other "simple facts" set forth in sentences that immediately follow the one above quoted.

The remaining nine allegations of error are substantially different forms of repeating the one numbered "5"—

The Hon. Commissioner erred in not holding that from a time antedating the settlement of said Lulu Palmer within said section, continuously, until the time of hearing, said southeast quarter of the southwest quarter of said section six was in the possession and occupation of and claimed by parties other than said contestee, under the homestead laws, and that during the same time until she made entry of said land said Lulu Palmer made no claim to said southeast quarter of the southwest quarter.

The argument accompanying the appeal contends:

If the record of evidence in this case had been carefully examined below, it ought to have been apparent to the writer of that decision that the case was conducted on the ground that Miss Palmer's claim never extended by reason of her settlement to the tract in dispute, but was an afterthought; that she never, by word, act, or deed, did anything to advise anyone of the extension of her claim to this tract; that she sat idly by while others were occupying and improving it, and acquiesced in their acts of settlement thereon, thus evidencing a lack of purpose on her part to include said tract within her claim, while at the same time her inaction in respect of the claim constituted, under the circumstances, a fraud on her part, if she in fact did intend to claim it.

Neither of contestant's counsel makes any direct reference to the fact upon which Miss Palmer appears principally to rely: to wit, the frequent ruling of the Department that improvements made upon

public land prior to survey constitute notice of claim to the entire technical quarter-section upon which they are found (see *Luke v. Birdwell*, 20 L. D., 338, and many other cases). Nevertheless, their contention is to the effect that by her actions she excluded herself from the operations of said ruling, and is now estopped from claiming the tract in controversy. This contention merits careful consideration.

When Miss Palmer settled upon the northwest quarter of this quarter-section, in August, 1902, the "forty" in controversy was occupied by John Tisdale. She does not allege that she ever informed him that she claimed it. Indeed, it does not appear that she ever saw him.

J. A. Folk took possession of the tract in May, 1903. She became well acquainted with him and his family; went to his cabin, she testifies (see page 73 of the transcript of the testimony), "nearly every day, to get milk of him." She adds:

I was at his house one day, and he asked me how I took my claim? and I said I took it in a square.

Q. Where was he living then?—A. He was living on this forty.

Q. What more did he say to you, if anything?—A. That was all the conversation.

Here was certainly a good opportunity for her to tell him that her claim, which she "took in a square," included the "forty" on which they two were conversing; but it does not appear that she did so.

Folk sold out to Parker, who took up his residence in the house on the "forty" in controversy; but it does not appear that Miss Palmer ever informed him that she claimed the land.

Next came the contestant, Peterson. He is a Dane by birth, and understands the English language so poorly that his examination at the hearing had to be conducted through an interpreter. The first witness was his son-in-law, B. A. Shak. He testified that Peterson, prior to his purchase of the land, had been living in Minnesota; but finding the winters there too cold for him, and wishing to live near his daughter, he asked his son-in-law to find some land in his (the son-in-law's) vicinity, which he (Peterson) could purchase and make his home upon for the remainder of his life. While looking about with this end in view, Shak found Mr. Parker living upon the tract in controversy, claiming it as his own, but willing to sell if he could get his price. Upon examining with a tentative purpose of purchasing, witness found a two-room cabin (in which Parker and his family lived), some open ground about it, and Parker in the act of cutting down more trees to increase the cultivable area; one hundred and fifty fruit trees set out, a barn, a root-house, a chicken-house, and "a spring fixed up for use"—the tract being enclosed with a pole-and-brush fence, sufficient to prevent the incursions of cattle.

Parker claimed the undisputed right to the land—so far as a right could be obtained before survey; and neither he nor the witness had the least idea that any other claimant was in existence. On May 3, 1904, Parker executed a document stating, "I have this day sold and conveyed my improvements on my squatter's claim," the description that followed including the tract in controversy, "to Nels Peterson, and received payment for the same"—not stating the consideration; but witness Fred. Wyman, "scaler and timber-cruiser," states in his deposition that the improvements were worth from \$300 to \$350. Peterson thereupon removed, with his family, from Minnesota to Montana, took up his residence on a part of the land so purchased—but not on the part here in controversy, as on account of his age he found it hard work to climb the hill leading to the house; so he built another house, on land more nearly level. Then he fenced his entire claim, setting posts perpendicularly in the ground and adding one wire on top of the pole-and-brush fence originally surrounding the tract in controversy. Witness William Myers, who put up the fence, being asked why he did not build a better one, replied, "The simple reason is, the old gentleman said he was out of money." This witness also cultivated and hoed about the trees in the orchard, until they were "in as nice condition as any trees in the country;" and did other work in the way of improving the land in controversy. The contestant kept a cow, grazing her upon this "forty;" and Miss Palmer testifies:

Q. Mr. Peterson kept a cow there, and you got milk from them, didn't you?—

A. Yes, sir.

Q. Frequently—that is, they supplied you with milk all this summer?—A. No, sir, not all the time.

Q. While they had milk they supplied you?—A. Yes, sir.

Although buying—at least, obtaining—milk of the Peterson family daily during the summer, given by a cow that was pastured on the land she now claims, which land Peterson was fencing and otherwise improving, Miss Palmer never mentioned to the Petersons that she claimed it; and the first that Peterson knew of such claim was when he and his son-in-law, Shak, the day after the filing of the township plat (being unaware of any necessity for exceeding haste), came to the local office to file for the tract (with the other "forties" settled upon by Peterson).

Thus, during all the period from the date of her alleged settlement (August 20, 1902), until the filing of the township plat (October 17, 1904), while all the time in frequent and much of the time in daily communication with the parties claiming the land, residing upon it, and expending their money in improving it, Miss Palmer stood idly by, and gave none of the parties any intimation of her claim. Her conduct comes within the scope and intent of the legal maxim, "He

who will not speak when he should speak, will not be heard when he would speak." As was said by the court in the case of *Hill v. Epley* (31 Penn. State Reports, p. 334, cited with approval in *Pendleton v. Grannis*, 14 L. D., 381):

Where the conduct of a party has been such as to induce action by another, he shall be precluded from afterward asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud on a party to assert what his previous conduct had denied, when on the faith of that denial others have acted.

Still more completely covering the case here under consideration is the departmental ruling in *Roberts et al. v. Gordon* (14 L. D., 475, 481):

One who fails to assert any claim to a tract of public land which is in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy, and improve the land, is estopped thereby from subsequently denying the good faith of said occupant, and asserting a right of priority in himself.

After a careful consideration of all the testimony, together with the appeal and the argument filed in support thereof, the Department is constrained to reverse the decision of your office, and to direct that Miss Palmer's entry be canceled as to the land in conflict, and that of Neils Peterson be allowed, unless some other reason to the contrary shall appear.

YELLOWSTONE FOREST RESERVE—CERTAIN LANDS OPEN TO
HOMESTEAD SETTLEMENT AND ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 19, 1906.

Register and Receiver, Lander, Wyoming.

GENTLEMEN: March 15, 1906, the following act (Public, No. 46) was approved:

AN ACT To extend the provisions of the homestead laws to certain lands in the Yellowstone forest reserve.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the general provisions of the homestead laws of the United States be, and the same are hereby, extended to and over the surveyed lands in townships forty-eight, forty-nine, and fifty, and ranges one hundred and five and one hundred and six, within the Yellowstone forest reserve, and the said lands shall be subject to entry ninety days after the passage of this act, within which ninety day period the Secretary of Agriculture may set aside such portions of said lands as were not occupied by a *bona fide* settler January first, nineteen hundred and six, not to exceed in the aggregate one hundred and sixty acres, as may be necessary for forest reserve.

administrative purposes, which lands so set aside shall not be subject to settlement, entry or location during the life of the forest reserve: *Provided*, That the commutation clause of the homestead laws shall not apply to the said lands, and any *bona fide* settler who made settlement on said lands prior to January first, nineteen hundred and six, and who had prior to that time lost or exercised his homestead right, may enter and perfect title to the lands settled upon by him as though his homestead right had not been lost or exercised, upon the payment of the sum of one dollar and twenty-five cents per acre for the land included in his entry at the time of making final proof.

The said act does not take the land out of the reserve, but merely permits settlement and entry under the homestead law, and applies to the surveyed lands only. It does not permit settlement or entry of the unsurveyed portion of said townships. The surveyed lands are subject to appropriation under section 2289 of the Revised Statutes only, without the right of commutation, and any application to enter or appropriate the land under any other law, except the mineral law, must be rejected.

Bona fide settlers on the land have a preference right of entry and those whose settlements were made prior to January 1, 1906, may make entry notwithstanding they may have previously lost or exercised their homestead right, but will be required to make payment for the land entered at the rate of \$1.25 per acre at the time of making final proof. As to parties other than such settlers who attempt a second use of the right to make entry, you will be governed by the act of April 28, 1904 (33 Stat., 527), construed by the Department in the case of *Cox v. Wells*, 33 L. D., 657. Applicants to make second entry under the provisions hereof must describe the land formerly entered in such manner as to enable this office to readily identify the entry. *Bona fide* settlers will be allowed credit for the time heretofore spent on the land entered. While the land has been subject to settlement since the approval of the act, March 15, 1906, the same does not become subject to entry until ninety days after that date, or on June 13, 1906. The entries will be made in the regular manner and given a regular number of your homestead series, referring to the act as authority therefor.

Below follows a list of the land selected under said act by the Secretary of Agriculture for forestry administrative purposes, and the same are not subject to settlement or entry; nor will any settlement subsequent to January 1, 1906, prevail against the selection by the Agricultural Department:

Lots 6, 8, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, T. 48 N., R. 106 W., 6th P. M.

Very respectfully;

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

INDIAN LAND—ALLOTMENT—HOMESTEAD ENTRY.

GEORGE H. DUPUIS.

An Indian to whom land in a reservation has been allotted as a member of a tribe, but which land has never become a part of the public domain subject to the general provisions of the homestead law, can not, as a citizen of the United States, make homestead entry, under section 2289 of the Revised Statutes, of the land so allotted to him.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 21, 1906. (C. J. G.)

An appeal has been filed by George H. Dupuis from the decision of your office of December 27, 1905, sustaining the action of the local officers denying his application to make homestead entry under section 2289 of the Revised Statutes for the NW. $\frac{1}{4}$ of Sec. 34, T 31 N., R. 4 W., O'Neill, Nebraska.

The applicant is a Santee Sioux Indian and in an accompanying affidavit alleges:

In the year 1885 and for many years previous thereto I had voluntarily taken up my residence on the land above described within Knox County, Nebraska, separate and apart from any and all tribes of Indians and did on such occasion adopt the habits of civilized life and from said time to the present I have voluntarily kept my said residence separate and apart from any and all tribes of Indians and have kept up and within the habits and customs of civilized life and have not returned to the customs and manners of my tribe, whereby I am, and from the year 1887 have been, a citizen of the United States and as such am entitled to all the rights and privileges of citizens.

* * * * *

I am the identical person for whom the above described land is set and held apart for occupancy and homestead under the 6th article of the Sioux Treaty of 1868; that I have not made proof under said sixth article and have not received patent or any title to said land or certificate therefor and I hereby elect to hold and occupy the land above described under and by virtue of section 2289 of the Revised Statutes of the United States, and in consideration of filing on said land under the general homestead laws, I hereby waive my right to hold and claim said land under said sixth article of said Treaty.

I further show that I took up my residence on the above described land in 1885 and from said date to the present have held and occupied the same as my homestead, continuously.

I further show that I have made lasting and valuable improvements on said land consisting of 140 acres of breaking, done in 1885 and since, that I have also a house 16 feet by 28 feet; also barns and fencing, etc., and have made divers other improvements.

It is stated in the decision of your office that the schedule of allotments and assignments to Santee Sioux Indians shows the land now applied for by Dupuis to be embraced in allotment No. 192, made to him March 31, 1885. His application was rejected by the local officers

for this reason. The concluding paragraph of the treaty of April 29, 1868 (15 Stat., 635, 637), with the different tribes of Sioux Indians, under which said land was set apart for Dupuis, is in part as follows:

And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the commissioner of the general land office, and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

A proviso in the act of March 1, 1883 (22 Stat., 433, 444), is as follows:

That the patents authorized to be issued to certain individual Indians by the concluding paragraph of article six of the treaty with the Sioux Indians, proclaimed, the twenty-fourth day of February, eighteen hundred and sixty-nine, shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee discharged of said trust and free of all charge or incumbrance whatsoever, and no contract by any such Indian creating any charge or incumbrance thereon or liability of said land for payment thereof shall be valid.

It is alleged that certificate never issued to Dupuis for the land set apart for him, that he never applied for nor received patent under article 6 of the treaty of 1868, and the records of your office do not show that trust patent ever issued to him under the act of 1883. His present application is based on the claim that he has lived on his land separate and apart from his tribe, has adopted the habits of civilized life, and therefore, under the general allotment act of February 8, 1887 (24 Stat., 388), is a citizen of the United States

and as such is entitled to all the rights and privileges of other citizens. Section 6 of said act provides, among other things:

Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, etc.

A citizen of the United States can only make homestead entry, under section 2289 of the Revised Statutes, of lands subject thereto and that are part of the public domain. The land in question was allotted to Dupuis as part of an Indian reservation and such allotment was made and he was entitled thereto by virtue of being a member of the Santee Sioux tribe of Indians. The fact that the land was set apart for him under article 6 of the treaty of 1868 in itself determines the character of said land and distinguishes it from public lands subject to entry under the general provisions of the homestead law. The lands in said reservation not theretofore allotted to Indians were by executive order restored to the public domain on April 15, 1885, but the land set apart for Dupuis March 31, 1885, was not so restored; and his election to waive his right to hold the land under article 6 of the treaty and enter the same under section 2289 of the Revised Statutes, does not make it public land. On the contrary, it was held for his benefit, he and it remained under the supervision of the Indian department and upon the required showing a trust patent declaring "that the United States does and will hold the land" for his benefit was to be issued. As stated the land constituted a part of an Indian reservation which was disposed of by treaty stipulation in a specific manner and whatever rights Dupuis had or acquired in said land were based on the fact of his being a member of the Santee Sioux tribe of Indians. These are far different attributes from those contemplated by the act of 1887 having reference to an Indian who takes up his residence separate and apart from his tribe and who by reason thereof acquires the rights and privileges of citizens of the United States, among them being the right to make homestead entry of public lands under section 2289 of the Revised Statutes.

The decision of your office concludes as follows:

If no appeal is taken from this decision, a patent in trust will be issued to him, as provided by the act of March 1, 1883, *supra*.

This is undoubtedly the proper course to pursue, provided Dupuis possesses the requisite qualifications under article 6 of the treaty of 1868. Accordingly, if a trust patent shall be issued, then if Dupuis can show the proper qualifications patent in fee simple may issue to him under the act of May 8, 1906 (Public—No. 149), which provides:

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent

and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, etc.

The decision of your office, in so far as it denies the application of Dupuis to make homestead entry under section 2289 of the Revised Statutes, is hereby affirmed, and the papers are returned for appropriate action, after further consideration, and investigation if necessary, in accordance with the views herein expressed.

REPAYMENT—TIMBER AND STONE APPLICATION.

T. J. MURPHY.

Where an applicant under the timber and stone act states in his declaratory statement that he has personally examined the land applied for, when as a matter of fact he has not done so, but in his final proof swears that no inspection of the land has ever been made by him, entry on such proof can not be allowed, but as the purchase money paid by him upon submission of the proof still remains in the control and custody of the land department, repayment thereof may be made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 21, 1906.* (C. J. G.)

An appeal has been filed by T. J. Murphy from the decision of your office of October 17, 1905, rejecting his application for the return of the purchase money paid by him upon submitting final proof under the timber and stone act of June 3, 1878 (20 Stat., 89), for the NE. $\frac{1}{4}$ of Sec. 32, T. 28 S., R. 16 E., Lakeview, Oregon.

Murphy filed declaratory statement under said act in October, 1902, in which he alleged, among other things—

that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements.

He advertised to make proof January 21, 1903, but failed to do so and thereupon made application to readvertise, which was rejected by the local officers on the ground of his failure to submit proof on the date named or within ten days thereafter. Murphy stated that his failure was due to the fact that he did not have the money required to pay the purchase price for the land and attendant expenses; that his application was made in good faith and it was his intention to perfect title to the land. Upon appeal your office directed the local officers, in the absence of any adverse claim to the land, to allow Murphy to readvertise. This he did and submitted proof October 20, 1904, which was rejected by the local officers for the reason that no personal examination of the land had been made by

Murphy. An appeal was taken to your office December 12, 1904, in which it was urged that it was error to hold that Murphy could not make entry under the act of 1878 without a personal examination of the land, citing the case of *Hoover v. Salling* (110 Fed. Rep., 43). As hereinbefore shown, he stated in his declaratory statement that he had made a personal examination of the land. In his final proof, replying to question 4—"Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?"—Murphy stated: "I am not." And in answer to question 5—"When and in what manner was such inspection made?"—he replied, "Made none." In support of his appeal Murphy alleged that he was advised by a United States commissioner that it was not necessary for him to personally inspect the land; that he had no recollection of having made a sworn statement to the effect that he had made such examination. Your office, however, sustained the action of the local officers, holding that Murphy was not qualified to make entry under the timber and stone act, basing such holding on unreported departmental decision of July 9, 1902, in which, referring to decision in the case of *Hoover v. Salling*, *supra*, it was said:

The Department has already had occasion to consider the effect that should be given this decision in the administration of the act above cited, but has not found it necessary, up to the present time, to pass finally upon the question, and it is not deemed advisable to make any change in the existing regulations.

Your office also referred to the case of Patrick McNamee (32 L. D., 606), wherein it is held (syllabus):

Where an applicant to purchase under the act of June 3, 1878, states in his preliminary affidavit that he has personally examined the land, and it subsequently appears from his final proof that he had not made personal examination of the land prior to making such affidavit, his application will be rejected.

On September 20, 1905, Murphy filed the following affidavit in your office:

In 1902, I was manager of the Honeyman McBride's wholesale woolen house, and in that capacity, frequently met Jacob Wrage, a tailor, at that time doing business in Corvallis. He repeatedly asked me or advised me to take out a timber claim. I refused many times, principally under plea that I had not time to go on the land. His answer was to me always that there was no occasion for me to go on the land, and he showed me a citation, which he received from J. W. Hamaker, U. S. Land Commissioner of Klamath Falls, in which the Court decided personal examination was not necessary. Such a citation is attached to the papers, which is in your office, and which I showed in Klamath Falls to the commissioner at the time I made application for final proof.

About October, 1902, I decided to make an application, and one Sunday morning as I was about to leave Portland, Wrage called at my residence and asked me to sign the application. I looked hurriedly at it and saw that it was an application of land. I did not read it carefully or thoroughly and my carelessness has placed me in the unfortunate position I am now in. I received a copy

of the County Examiner, the paper in which my application was published in due time, and then noticed that a sworn statement was supposed to have been made by Thomas J. Murphy.

I expressed my uneasiness to Wrage when I sent him money, but in his answer the same excuse was given, that is was not necessary to appear in person. In January, 1903, Wrage warned me not to send down money for final proof. On February the 4th, I received another letter from Wrage, in which he enclosed the letter of Hamaker of January 27th, 1903, to him showing that if I intended to cheat the Government or make any false representation, I might have done so at that time, and now have possession of the receipt or the patent from your office.

In January or early in February of 1903, Hamaker was in Portland, and Wrage requested me to call and see Mr. Hamaker, which I refused. On February 25th an answer received from me by Hamaker, asking him about the status of the case at that time, he sent me a copy of the affidavit for re-advertisement; also a favor of his on March 14th referring to the same matter; one of which letters contained a citation of Judge Grosseup relating to the decision in a case similar to mine.

During the spring of 1903 I called at the Surveyors General office in Portland and had an interview with Mr. Linnen, one of your staff from Washington. I explained the case thoroughly to him and showed him all the papers in my possession. He asked me to call again and Col. Green, Mr. Linnen and myself talked the matter over, and I received an impression in my mind which evidently was wrong, that under the many peculiar circumstances, and in the face of the citation sent to me by Hamaker, that a personal inspection of the land would be waived.

I then pressed the matter from the Lake View office and in March, 1904, I was given permission to re-advertise. I complied with all the requirements at the time, and in October I visited Klamath Falls and made application for final proof. In Klamath Falls I had an interview with one of your special agents, a Mr. Shaw, I think, was his name, and told the circumstances to him, and he also expressed his opinion that it was not necessary under the circumstances for me to visit the land. The same day I appeared before him to make final proof. . . .

Your office, in passing upon Murphy's application for return of purchase money, concluded as follows:

There is no doubt in my mind that Mr. Murphy's signature to the sworn statement No. 1431, for the NE. $\frac{1}{4}$ of Sec. 32, T. 38 S., R. 17 E., is genuine, and that the statement therein that he had personally examined said land is false, and that he attempted to take advantage of said sworn statement when he asked to be allowed to re-advertise and when he made his final proof.

As Mr. Murphy has been guilty of false swearing and deceit in his sworn statement, he is not entitled to the return of the purchase money now in the hands of the Receiver, and you will so advise the party and of his right of appeal. See case of James T. Ball (33 L. D., 566).

It is not denied that Murphy signed the declaratory statement in which your office finds he was guilty of false swearing. In view of the fact that it was made to appear that he had not personally examined the land involved prior to such statement, he could not be permitted to complete entry for said land. The act of 1878 has uniformly been construed by the Department as requiring such per-

sonal examination. Patrick McNamee, *supra*; Grace P. Featherstone (32 L. D., 631). Hence, it was properly held that Murphy was not qualified to enter the land applied for by him. While the statement contained in his declaratory statement as to having "personally examined" the land was an erroneous one, yet under the facts disclosed it is not necessarily proven that such statement was made with the deliberate and culpable purpose of deceiving and defrauding the Government. On the contrary, when making final proof he openly stated that he had not personally examined the land. The misstatement contained in his declaratory was therefore not carried into his final proof upon which he sought to perfect entry. The case under the facts resolves itself rather, as claimed in the appeal, not into an attempt to make entry based upon the statement that he had personally examined the land, but into an attempt to make entry regardless of the fact that he had not personally examined the land as stated in his final proof. The case is clearly distinguished from that of James T. Ball, *supra*. There, not only the declaratory statement but the final proof contained false statements. Upon the face of the final proof in that case entry was allowable, and that consummation was avoided only by an investigation disclosing the falsity of both declaratory statement and final proof. Here, Murphy's final proof disclosed facts upon its face which showed the entry could not be allowed. As the money in question still remains in the control and custody of the land department it may, for proper reasons, be returned to the purchaser, no specific statutory authority being required to do so. It is believed sufficient showing and warrant have been made to entitle Murphy to a return of the money applied for by him. The decision of your office is accordingly hereby reversed, and if no other objection shall appear, the money question will be returned.

TOWNSITE PROOF—INDIAN LAND.

DIOCESE OF DULUTH *v.* BENA TOWNSITE.

There is no requirement that townsite proof shall be made by persons not resident of the town, and such residence does not affect their competency to make such proof.

The act of March 3, 1905, authorizes the purchase by the diocese of Duluth of one hundred and sixty acres of land in the ceded Chippewa Indian reservation, but as that act does not recognize any rights as accruing to the diocese by virtue of applications theretofore made by it for the dedication, or purchase, of certain of said lands for mission or church purposes, any application by the diocese under said act can not be given relation to the earlier applications made prior to the passage of the act, to the prejudice of intervening adverse rights.

Acting Secretary Wilson to the Commissioner of the General Land
(F. L. C.) *Office, June 26, 1906.* (J. R. W.)

The Protestant Episcopal Mission of the Diocese of Duluth appealed from your decision of March 6, 1906, rejecting its application under the act of March 3, 1905 (33 Stat., 1048, 1068), to purchase the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 27, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 34, T. 145 N., R. 28 W., Cass Lake, Minnesota, and awarding the right of entry of them to the judge of the district court, as trustee, as part of the Bena Townsite.

The land is within the ceded Chippewa Indian reservation opened to entry under the acts of January 14, 1889 (25 Stat., 642), June 27, 1902 (32 Stat., 400), and February 9, 1903 (32 Stat., 820), which latter act extended the townsite laws thereto. April 28, 1902, the archdeacon of the diocese, superintendent of missions, applied, through the acting Indian agent, Leech Lake, to have these tracts set apart for church purposes, which the Department held to be not permissible under the provisions of law then existing for disposal of these lands. October 27, 1903, and June 27, 1904, respectively, W. S. McClenahan, judge of the district court in and for Cass county, and J. G. McGarry, probate judge in and for said county, filed their respective townsite declaratory statements for three hundred and twenty acres, including these lands, each alleging an urban settlement and occupation of them October 19, 1903, and applying to purchase them as trustee for the occupants. November 22, and June 28, 1904, respectively, the local office rejected these applications, for the reason that April 23, 1903, these lands were withdrawn from entry and reserved "for the purposes of reforestation," notified to the local office December 3, 1903. Upon petition of the townsite settlers, the Department, February 13, 1904, held (unreported) that, if urban settlement of the land was made before December 3, 1903, the case should be governed by the decision in Richards Townsite (32 L. D., 319). After examination and report by a special agent, directed by the Department, April 30, 1904, the withdrawal of April 23, 1903, was modified to exclude these lands therefrom. May 9, 1904, for the reason that Congress was considering a bill for disposal of these lands to the Diocese of Duluth, promulgation of its decision of April 30, 1904, was suspended by the Department until March 31, 1905, when, Congress having adjourned without passing the bill, the order of suspension was vacated; and, on March 6, 1905, the diocese by its archdeacon filed with the Secretary of the Interior and in your office applications to purchase the lands under the act of March 3, 1905, *supra*, and April 17, 1905, filed a similar application in the local office, which rejected the same, and appeal was taken from that action to your office.

June 13, 1905, in Bena Townsite (34 L. D., 24), it was held that within and for the State of Minnesota, the judge of the district court within and for the county, being designated by the law of that State to, act as the townsite trustee, was the proper officer to make the entry.

In the meantime, March 8, and April 20, 1905, protests of the archdeacon of the diocese were filed against the townsite entry, and notice was ordered given of any further proceedings looking to appropriation of these lands. Notice was duly given by the applicant for townsite entry that he would offer proof at the local office, September 16, 1905, at which time both parties appeared, and the diocese renewed its protest. Part of the record is a stipulation by counsel for the parties respecting procedure.

November 13, 1905, the local office found that urban settlement was made upon the lands October 19, 1903, by eleven persons, named, who did some street clearing and other improvements between that time and January 12, 1904, when the Indian agent ordered them off and took charge of their properties and belongings; that September 7, or 8, 1904, lines were run, some clearing done, and buildings attempted to be built, when the agent stopped, and September 10, 1904, gave claimants notice to desist from further attempt at town development; that April, 1905, the notice being recalled, the urban settlers renewed their development work, and at the date of hearing there were on the townsite twenty-one framed residences, two-store buildings, three-quarters of a mile of streets opened, cleared, and partially graded; the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 27, and part of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 34, were platted; the value of improvements was \$8,000; fifteen residents owned their houses, and with their families resided therein on the townsite, and others not owning their houses resided there with their families; that, excluding Indians, there were not one hundred persons having a "fixed place of residence" upon the townsite, and that the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 27, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 34, only were settled upon, and were all the land that could be entered as a townsite under the proof. Both parties appealed to your office.

Your office reviewing the evidence pointed out omissions and errors in the local office computation of residents, and found that something more than one hundred and one persons were fixed residents of the townsite, and held that prior to the act of March 3, 1905, *supra*, there was no authority for dedication of any of these lands to church or mission purposes, so that the prior application of the diocese could not segregate them from appropriation as a townsite; that the urban settlement, October, 1903, and application for townsite entry under the act of February 9, 1903, *supra*, did segregate the land and exclude it from purchase by the diocese; that the

townsite application and proof are sufficient in form and substance, and warrant entry of the three hundred and twenty acres applied for, including the two tracts here in controversy, and allowed the townsite entry, conditioned upon payment for the land and appraised value of the timber thereon amounting, in the aggregate, to \$2401. The Diocese of Duluth appealed from your decision.

It is assigned as errors of your decision that the townsite proof was not made by disinterested witnesses; in not finding that the entry is speculative, for the benefit of a private corporation organized as the Bena Townsite Company; in finding that there were one hundred inhabitants, or that the lands were occupied as a townsite from October 19, 1903, to April 28, 1905; in finding that the application of the diocese under the act of March 3, 1905, was not "a continuance of and consummation of the rights and equities therein dating from March 1, 1902, and prior thereto," and was subsequent to the townsite application.

The Department is not cited to any rule or decision requiring proof in townsite cases by witnesses not resident of the town. All residents of the town are in such cases interested as beneficiaries of the entry, but the notoriety of the fact of urban settlement is such that the probability of entry upon fictitious evidence is much more remote than is that of fictitious proof of compliance with law in case of private entry. The case of *W. W. Burke* (1 L. D., 96), cited by appellant, was not a decision of the Department. That in *Cassius C. Hammond* (7 L. D., 88) was, however, departmental, and holds that with settlement claimants' proof, there must be two corroborating witnesses. It is true, in strictly technical sense, that a townsite entry is generically a settlement entry, and all occupants of lots or tracts within the town are interested, as their expectant titles must come through the entry by their trustee. The rule however in case of *Cassius C. Hammond* does not exclude their competency. The probability of conspiracy and false testimony is much more remote in case of townsite than of private entries, and the number of people in a village community is a matter capable of observation to people generally and capable of rebuttal, and the reason for proof by disinterested witnesses does not exist.

It is also impossible that a townsite entry under the laws of the United States can be speculative, or for the benefit of a private corporation. The law requires the entry to be for use and benefit of the occupants or residents of the town, and the trust is enforceable by the courts for benefit of the occupants as to the tracts which they severally occupy, and for the town community as to tracts not appropriated. Without neglect of duty or breach of the trust, there can not be a speculative townsite entry.

As to the number of resident inhabitants, the concurring findings of the local office and your office to the number of ninety-seven are fully supported by the testimony, and that number is sufficient to include more than the land claimed by the diocese, but examination of the evidence and the finding of the local office shows that it inadvertently overlooked and failed to include the family of Fred Tibbets, wife and child, and the local office deemed the telegraph operator and the railroad agent not proper to be enumerated because they boarded at the hotel, instead of living in houses owned by themselves or rented. The latter two persons should not be regarded as transients. They must be regarded as members of the urban community, as they or some other person in their stead to perform their duty must be in and part of the community, so long as a railroad and a telegraph with station and office exist in the town to transact the business of transportation of persons and freight, and transmission of intelligence. While persons in such employment are liable to be transferred by their employers to other points, the necessity of traffic requires the presence of such person, and while such a person is in the town with no present probability of being transferred elsewhere, he must be regarded as one of the residents entitled to be enumerated in computing the number of the community or town population.

The act of March 3, 1905, contained nothing recognizing the former requests of the diocese for dedication of these lands to mission or church purposes, or for their purchase. No application under the act could therefore be given relation to the earlier applications made prior to date of its passage. In the meantime, the act of February 9, 1903, opened the land to urban appropriation, and such appropriation was made. Thereby the land became segregated against any later appropriation by the diocese to its use.

The forcible exclusion of the urban settlers by the Indian agent did not affect their rights acquired by settlement. The finding of the local office and your office that their settlement was in good faith is supported fully by the evidence in the record.

Your decision is affirmed.

CONTEST AFFIDAVIT—PRIORITY OF APPLICATION.

JONES ET AL. *v.* BETTIS.

An application to contest received by mail will not be regarded as having been presented or filed until it is taken up, numbered, and entered of record, and where a contest application is presented in person and in the ordinary course of business is accepted, numbered, and entered of record, and another application to contest the same entry is at that time, unknown to the local officers, in the unopened mail in the office, priority will be accorded the application first accepted and filed.

Acting Secretary Wilson to the Commissioner of the General Land
(F. L. C.) *Office, June 26, 1906.* (A. W. P.)

George W. Jones has appealed from your office decision of October 28, 1905, wherein you affirm the action of the local officers in rejecting his affidavit of contest against homestead entry No. 26804 (Wakeeney series), made by Minnie Bettis on October 24, 1903, for the SW. $\frac{1}{4}$, Sec. 12, T. 13 S., R. 39 W., Colby, Kansas, land district, and awarding a prior right of contest against said entry to Joseph Henry Wells.

It appears from a note attached to Jones's affidavit of contest, signed by the register and receiver, that it—

was filed in this office about 9:30 A. M., September 4, 1905, and rejected for the reason that at 9 A. M., on September 4, 1905, the contest affidavit of Joseph Henry Wells against said homestead entry was upon the register's desk in the unopened mail, and filed prior to the affidavit of George W. Jones.

The following notice appears to have been given Jones by letter of September 4, 1905, signed by the register:

Referring to your application to contest H. E. No. 26804 made Oct. 24th, 1904 [1903], by Minnie Bettis, for the SW. $\frac{1}{4}$, Sec. 12, T. 13 S., R. 39 W., you are advised that at 9 A. M. Sept. 4th, 190— [1905], a contest affidavit for the above land by Joseph H. Wells, was in the mail and unopened on the register's desk, at the time you made your application, shortly after 9 A. M., hence notice can not issue to you for the reason that the application of Wells was the first filed, the mail was not opened until after you left the office, as otherwise you would have been informed when here.

In affirming the above action of the local officers, by decision of October 28, 1905, you state that:

It is alleged by Jones, by way of affidavit, that he reached your office at four minutes after nine o'clock on the morning of September 4, and made inquiry if a contest had been filed against said entry and was informed that there was not; that the receiver then gave him a blank affidavit of contest and affiant sat down at his desk and prepared the affidavit; that affiant remained in your office until noon of the same day, and received no notice of any other contest.

In the matter of alleged simultaneous applications to contest it has been held that the first one accepted is entitled to proceed. (33 L. D., 582.) The same rule would not apply in this case for the reason that Wells's affidavit had been in your office some minutes before Jones reached there and for one-half hour before the contest affidavit of Jones was actually filed.

I see no sufficient reason for disturbing your action in awarding the prior right of contest to Wells, whose affidavit will remain suspended pending the final termination of the contest brought by the former.

From said decision Jones has appealed to this Department, urging that it was error to award the prior right of contest to Wells. He also alleges that the record does not warrant the statements contained in your office decision, "that he reached the local office at four minutes after nine o'clock on the morning of September 4," and that his "affidavit of contest was filed at 9:30 A. M."

The first statement appears to have been based upon Jones's corroborated affidavit accompanying his appeal to your office. Therein he alleges that when he arrived at the local office "it was just four minutes of 9 o'clock." In the corroborating affidavits of Fred B. Lewis and Martha Coleman it is alleged that affiants arrived at the local office a few minutes before nine o'clock A. M., and that Jones arrived a minute or two later. As to the second statement, it will be observed that in the note attached to Jones's affidavit the local officers state that it "was filed in this office about 9:30 A. M." Referring to the Wells affidavit therein they state that it was upon the register's desk in the unopened mail, and filed prior to Jones's affidavit. In the letter to Jones notifying him of the rejection thereof, they refer to his application as having been made "shortly after 9 A. M." Therein they again state that at 9 A. M. the Wells application was in the unopened mail on the register's desk, which "was not opened until after you left the office." It will also be observed that the local officers in their letter transmitting the appeal of Jones to your office state that when the door was opened at 9 A. M. Jones "entered the office, procured the status of said entry No. 26804, called for and received a blank affidavit of contest, sat down at a desk and at his leisure prepared, presented, and was sworn to his affidavit of contest against said homestead entry, all of which transpired after the office was opened at 9 o'clock A. M., on said September 4, 1905, while the affidavit of contest of Joseph Henry Wells was on file promptly at and before 9 o'clock A. M. on said day."

From the above quotations from the record it would appear that neither of the statements contained in your office decision, to which objection is made, is technically correct. This is material, however, only to the extent that such corrections may affect the determination as to which of the affidavits was first filed with the local officers.

The only question presented herein for consideration is as to the priority between Jones and Wells as contestants of Minnie Bettis's homestead entry. It is clear from certain statements contained in the local officers' letters, and hereinbefore quoted, that at the time Jones appeared at the local land office and prior to the subsequent filing of his affidavit of contest, the contest affidavit of Wells was in the unopened mail on the register's desk; but that this mail was not opened until after his (Jones's) affidavit had been accepted and contest fee paid. Can such a contest application in the unopened mail on the register's desk be said to have been filed prior to one properly tendered at the local office by an applicant and accepted without knowledge of the receipt of the mail application? Both the finding of the local officers and decision of your office hold in the affirmative. In your said decision it was determined that the two applications in question were not simultaneously filed, as in the case of

Barnes *v.* Smith (33 L. D., 582), therein cited. In that case, it will be observed, both applications were presented by mail and received at the local office at the same time. However, they were not regarded as simultaneous, it being held that the one first taken up, numbered, and entered on the records, in the regular course of business, was entitled to precedence. While not governing in the case at bar, yet it might reasonably be inferred from the principle therein enunciated, and the Department now so holds, that where a contest application is received by mail, it will not be regarded as having been presented or filed until such application has in fact been taken up, numbered, and entered on the records.

In the somewhat similar case of Kelso *v.* Janeway *et al.* (22 L. D., 242), it was held (syllabus) that:

As between two applications to contest an entry, one received by mail in due course, and lying unopened on the register's desk at nine o'clock in the morning, and one presented in person at such hour, priority should be accorded the latter.

The effect of this holding would appear to give precedence to the application presented in person over that received and among the unopened mail at 9 A. M., only when the former was in fact also tendered at that hour, but the decision seems to go further than indicated by the above syllabus. Therein it was said (p. 244) that:

Where applications received by mail are lying on the desk of the local officers on the opening of the office for business, if in the ordinary course of business the mail is in fact opened and the application thus in business hours becomes presented to the officers, it will have priority, but if in like manner an applicant presents his contest at once, at nine o'clock or before the mail is opened, then such application should have priority.

In the case at bar, as stated, Wells's application was in the unopened mail at 9 A. M., at which hour upon the opening of the local office Jones entered, procured the status of the homestead entry of Minnie Bettis, received a blank affidavit which he prepared, was sworn to, and filed shortly thereafter, but prior to the opening of the mail and filing of the Wells contest application, and in accordance with the views herein expressed priority must be accorded the application of Jones, and the judgment of your office to the contrary reversed.

Accompanying the record is also an appeal prosecuted by the entrywoman, Minnie Bettis, and a separate protest of George W. Jones from what purports to be the erroneous action of the local officers in proceeding with hearing and determination of the Wells contest during the pendency of Jones's appeal, but, as the same were no part thereof, they have not been considered by the Department, but are herewith returned, with the accompanying papers, for appropriate action by your office.

SCHOOL LAND-SURVEY-FRACTIONAL TOWNSHIP.

STATE OF CALIFORNIA.

Where at the time of survey of a township a portion thereof was returned as a "salt lake now dry," and no further survey of the township has since been made, the State, after a lapse of more than forty years, is justified in accepting such survey as a final and complete survey of the township and in proceeding with the adjustment of its school land grant upon the theory that the township is fractional.

Acting Secretary Wilson to the Commissioner of the General Land
(F. L. C.) *Office, June 26, 1906.* (F. W. C.)

The State of California has appealed from your office decision of December 15, 1905, holding for cancellation its indemnity school land list of selections, R. and R. No. 198, state No. 3046, being of lot 2 and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 3, S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 28, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, all in T. 40 N., R. 3 W., M. D. M., Redding land district, California, embracing 314.70 acres, the selection being made in lieu of undescribed lands amounting to 314.70 acres, Sec. 16, T. 30 S., R. 38 E., M. D. M., alleged to be mineral in character.

The decision appealed from holds that the selection is invalid for the reason that the base land is unsurveyed. Other objections are made to the list but are immaterial in view of the conclusion herein reached.

It seems that survey was made of township 30 south, range 38 east, M. D. M., in 1856, by which public lands within the township were surveyed into sections and parts of sections, amounting to 14136.36 acres, the remaining portion of the township, about 9000 acres, being returned as within a "salt lake now dry." If the portion of the township within said lake was dry land it should have been regularly surveyed and platted and not meandered. No further or additional survey has ever been made of the portion of the township returned as within the limits of this lake.

On this return the question arises: Was the State on May 10, 1897, more than forty years after the survey of 1856, warranted in treating that survey as a complete survey of the township and proceeding with the adjustment of its grant in aid of common schools, accordingly? Without determining at this time as to whether survey should have been made of the portion of the township shown by the survey of 1856 to be within a lake, or whether survey thereof could now be made, under all the circumstances it is the opinion of this Department that the State was fully warranted in accepting the survey of 1856 as a final and complete survey of the township, and in proceeding in the

adjustment of its school land grant upon the theory that the township was fractional. Under this theory the State became entitled to 960 acres under its school grant on account of said township. By the survey of 1856, section 36 is in place. There was no section 16, the part of the township corresponding thereto being within the reported "dry lake."

If the State took the entire section 36 she would still be entitled to indemnity, because of the fractional township, to the amount of 320 acres, and if no other selections have been made on account of the loss of section 16 it would seem that the selection in question might be passed, if otherwise satisfactory. The fact that the State in its selection specifically defines the loss as being a part of section 16, mineral in character, should not defeat its substantial rights in the premises, provided it amends its list so as to show that the lieu lands are claimed because of the fractional character of the township. If the State insists, however, and persists in its claim to the section 16 in place, lost because of mineral character, she must await such time as, by appropriate survey, the said section 16 may be identified.

In view of this holding it is deemed inadvisable to pass finally upon the sufficiency of the selection in its present form, and the matter is therefore remanded to your office for further consideration and decision in the light of the holding herein made.

RICHMOND AND OTHER LODE CLAIMS.

Motion for review of departmental decision of April 12, 1906, 34 L. D., 554, denied by Secretary Hitchcock, June 30, 1906.

SCHOOL LAND GRANT—EXEMPTION OF MINERAL LANDS.

STATE OF SOUTH DAKOTA *v.* DELICATE.

The grant of sections sixteen and thirty-six, to the State of South Dakota for school purposes, by the act of February 22, 1889, took effect on the admission of the State into the Union as to lands of the class and character subject to the grant in such of said sections as were at that date identified by the government surveys. As to unsurveyed lands, the grant does not attach until identification by approved survey, and if at that time any of the lands embraced in such sections are known to be mineral in character they are excepted from the grant.

Any portion of the superficial area within the boundary lines fixed by the location of a valid lode mining claim, in conflict with a school section, may rightfully be claimed and held under the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 30, 1906.* (F. H. B.)

December 30, 1901, Thomas W. Delicate, as trustee, made entry (No. 1243) for the Road Agent and six other lode mining claims, survey No. 1408, Rapid City, South Dakota, land district.

It appearing from the field notes of survey and the official plat that one of the claims of the entered group, the Atlantic, embraces a small conflict with, and in the northeast corner of, school section 16, T. 2 S., R. 6 E., B. H. M., your office, December 12, 1903, directed the local officers, among other things, to notify the proper authorities of the State of South Dakota accordingly and to allow them sixty days within which to show cause why the mining claim should not pass to patent.

In response the State asserted, through its Attorney-General, and submitted a written argument to sustain, its claim to the land in controversy, and prayed that to the extent thereof the mineral entry be canceled and title thereto declared to be vested in the State.

Thereafter, by decision of January 16, 1905, finding and stating the facts to be that the Atlantic claim was located January 2, 1897, and that the township survey embracing the school section in question was executed August 12 to September 8, 1898, approved May 23, 1899, your office sustained the entry upon the ground, in substance and effect, that until the section was identified by the approved survey no right in the State could attach, and that prior to identification and at the time the mining claim was located the land in controversy was subject to location and entry under the mining laws.

From that decision the State has appealed to the Department. In brief and in so far as is pertinent to the present controversy, its contention is that by virtue of the provisions of the enabling act of February 22, 1889 (25 Stat., 676), whereunder it (together with North Dakota, Montana, and Washington) was admitted to the Union, and whereby sections 16 and 36 in every township were granted to the State for the benefit of public schools, the right and title of the State attached absolutely, at and as of the date of the act, to all lands, whether surveyed or unsurveyed—then and thereafter included in such sections—except only as to such lands as were known at that date to be mineral in character.

The granting provisions of the enabling act, applicable to the four States admitted under it and upon which the appellant State here relies, are contained in sections 10 and 11 thereof, as follows:

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands

equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school-fund, the interest of which only shall be expended in support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It is urged that the reservation, in section 11, from pre-emption, homestead entry or any other entry under the land laws of the United States, of the lands therein referred to, "whether surveyed or unsurveyed," distinguishes the grant, in respect of the time when the State's title to the unsurveyed lands takes effect, from the usual grants to other States for like purposes; and, as lending strength to this view, that the exceptions from the operation of the grant, recited in section 10, are in terms of the past tense and include only sections 16 and 36 sold or otherwise disposed of, or embraced in permanent reservations, etc., at the date of the act.

To support its contention the State cites certain decisions of the United States Supreme Court, with respect to grants to particular States, containing expressions to the general effect that words of present grant, in the absence of restraining clauses, import an immediate transfer of title—a grant *in praesenti*—although subsequent proceedings may be required to give precision to that title and attach it to specific tracts, and that whenever the identity of the granted lands is ascertained the title relates back to the date of the grant.

It may be remarked, in passing to a consideration of the question presented by the appeal, that the grants to the four States admitted under the enabling act of sections 16 and 36, if available, were to take effect "upon the admission of each of said States into the Union" and not as of the date of the act; and South Dakota's admission was proclaimed by the President November 2, 1889 (26 Stat., 1549).

The infirmity in the State's contention, in the view of the Department, is in respect of the force and effect of the grant so far as pertains to the unsurveyed lands which should be or were thereafter,

upon extension of the public surveys, embraced in sections 16 and 36. Neither the terms of the act nor the decisions cited sustain the theory that, unless excepted by reason of conditions existing at the date of the State's admission, such lands forthwith became subject to and are within the operation of the grant.

In *Schulenberg v. Harriman* (21 Wall., 44, 62), cited by the State, the court said that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts." And in the case of *Grinnell v. Railroad Co.* (103 U. S., 739), cited in the same connection, it was held that the grant of alternate odd-numbered sections, within certain limits, on each side of lines of railroad to be thereafter constructed was a grant *in praesenti*, and that upon definite location of the roads the identity of the granted lands was ascertained and the title related back to the date of the grant.

The Department fully recognizes the force of the general principle expressed in the first of the above cases, followed and in effect restated in the second, but the question here, as in any case, is in its application. Clearly, as the language imports, the principle is applicable only with respect to such lands as are within the intendment and purview of the grant; or as it may be stated, observing the language of the court in the second case, the title which relates back to the date of the grant must attach, upon ascertainment of their identity, to the "granted" lands. What is within the grant in each case is the first inquiry; and here the grants by the sections above quoted are subject to the further provisions of section 18 of the act, as follows:

That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said States, in lieu thereof, for the use and benefit of the common schools of said States.

In view of the express provisions of this section it is manifest that the last clause of section 11 was not intended to include mineral lands or entries thereof under the mining laws; and equally that the excepting provisions of section 10, the language of which is pointed out by the State as indicating the time at which adverse rights must have intervened, have no application to mineral appropriations.

By the terms of section 18 mineral lands are expressly exempted from the grants made by the act, and adequate provision is made for indemnity to each of the States concerned for such sections 16 and

36, or subdivisions thereof, as "shall be found. . . to be mineral lands," the tense importing that future disclosures were in contemplation. The express exemption is but a substantial reiteration of the provisions of section 2318, Revised Statutes, long antedating the State's grant, that—

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Pursuant thereto it has usually been specifically provided in the various grants made by Congress that mineral lands should be exempted; and the exemption is uniformly held to embrace all lands known to be mineral in character at the date title thereto would otherwise definitely vest.

The cases above mentioned are types of others cited by the State, and involved grants to aid in the future construction of lines of railroad. Giving the fullest effect to what is said by the court in each case, in connection with the facts thereof, as to the terms of present grant in which the various acts under consideration were framed, as importing grants *in praesenti*, and as to the retrospective relation of title upon identification of the subject-matter by the filing of maps of definite location, it does not follow, and the court has not held, that title will so relate and embrace lands which are ascertained prior to the filing of such maps to be of any excepted class or character. In holding, therefore, that upon definite attachment title relates back to the date of the granting act the court plainly speaks only of the lands to which title actually attaches under and by virtue of the act.

The doctrine of the relation of title necessarily implies the imperfection of title until the time when the relation occurs. So in this case, upon the public lands which were unsurveyed at the date of the State's admission there were no sections 16 and 36 to pass by the grant. Until the public surveys were extended thereover the State's title, if any, was in prospect merely: that title could attach only to the specific sections. Not until those sections were ascertained and established could the grant become operative as to them and the legal title thereto pass, and then only if they were of the class and character of lands subject to the grant.

That lands thereafter embraced in sections 16 and 36 and at that time known to be mineral in character were not intended to pass under the grant is, as before suggested, plainly apparent from the exempting provisions of section 18 of the act, which embrace all lands which "shall be found. . . to be mineral lands." It is not a *defeat* of the grant in any part by conditions subsequently arising: mineral lands, if known to be such, are not *within* the grant; and the grant can not *attach* to specific sections, or parts of sections, compris-

ing lands of known mineral character. Any such lands, therefore, so found to be mineral in character prior to the ascertainment, by approved survey, of sections 16 and 36, at which time the grant would otherwise become operative as to them and the legal title thereto pass, are within the exemption. See *Barden v. Northern Pacific Railroad Co.* (154 U. S., 288).

The question hereinabove discussed was considered by the Department in the recent case of *State of South Dakota v. Trinity Gold Mining Company* (34 L. D., 485), and, by reason of the similarity in material particulars in the corresponding sections of the acts providing for grants of lands to Utah and to South Dakota for the support of common schools, was disposed of under the principles remarked in the case of *Mahogany No. 2 Lode Claim* (33 L. D., 37) and announced in the decisions cited in the latter case, which came up from Utah. The principles as thus announced are of equal application and force here; but in view of the contentions which are elaborately and earnestly pressed upon the attention of the Department in the case at bar, and especially whereby it is sought to distinguish the grant here involved, the question has in this case been reviewed at length.

It is also objected by the State, in effect, that as the conflict embraces but a portion of the superficial area of the Atlantic claim, which is not asserted to contain in itself any mineral deposits, it was not exempted from the grant, irrespective of the date when the latter would take effect. In reply to this it may be said, whilst the portion of the mining claim so in conflict with the school section is altogether at one side and south of the indicated lode line of the claim, yet as it is within the boundary lines fixed by the location, which appears to be in all respects regular, it may rightfully be claimed and held under the mining laws. This is well explained in *Lindley on Mines* (2nd Ed., Vol. I, Sec. 71, p. 101), wherein, contrasting the original lode law of July 26, 1866 (14 Stat., 251), with the general law of May 10, 1872 (17 Stat., 91), the author of that treatise says:

Under the act of 1872 the miner locates a surface which must be so defined as to include the top, or apex, of his lode. Failing in this, he obtains nothing. If he mistakes the course of his vein, it is his loss. He can only hold the vein on its course to the extent that the top, or apex, thereof is found within his boundaries. He may thus acquire a superficies fifteen hundred feet in length by six hundred feet in width, if local regulations do not restrict these measurements.

In other words, under the old law he located the *lode*. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex, of the vein. If he makes such a location, containing the top, or

apex, of his discovered lode, he will be entitled to all other lodes having their tops, or apices, within their surface boundaries.

It is not alleged on the part of the State that there has been no sufficient lode discovery within the limits of the Atlantic claim, and no further question remains to be considered.

The decision of your office is affirmed.

SCHOOL LAND GRANT—MINING CLAIM—PROOF OF MINERAL CHARACTER.

STATE OF SOUTH DAKOTA *v.* WALSH.

Where the mineral character of a mining claim in conflict with a section claimed by the State under its school-land grant is challenged by the State, the usual formal proofs under mineral patent proceedings will not suffice, but in such case the mineral character of the claim involved must be established by substantive proof; and the State is not bound to take the initiative at a hearing ordered to determine that question.

Case of Mahoganey No. 2 Lode Claim, 33 L. D., 37, cited and distinguished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 30, 1906.* (F. H. B.)

The State of South Dakota has appealed from your office decision of October 12, 1905, holding for dismissal its protest against the entry (No. 1507, July 18, 1904) by John Walsh, Jr., for the Mitchell lode mining claim, survey No. 1811, Rapid City, South Dakota, land district, embracing a conflict with school section 36, T. 5 N., R. 2 E., B. H. M.

February 24, 1905, after mineral entry had been made and the record received, your office directed the local officers to notify the State authorities of the allowance of the entry and that sixty days' time would be afforded them within which to show cause why it should not be permitted to stand.

In response the State submitted protest against the entry in which it is denied that the land in controversy was known to be mineral in character at the date of approval of the township survey embracing the section in question, it being also therein contended that the grant to the State of sections 16 and 36 took effect as a present grant as to all sections not otherwise appropriated or known to be mineral in character at the date of the State's admission to the Union.

Upon receipt of the protest, and on May 6, 1905, your office ordered a hearing, to determine whether the conflict area was known to be mineral in character "at the date the right of the State would otherwise have attached thereto." What date was considered in that connection, or whether the question in that behalf raised by the protest

of the State was discussed in this particular case, does not appear from the record.

However, by the decision first above mentioned, from which the pending appeal is taken, your office dismissed the protest, stating that the local officers had—

transmitted evidence of service of said order for a hearing upon the mineral claimant and also upon the State authorities and reported that default was made by both parties at the hearing; and that no action of any kind had been taken thereon.

The mining claim involved was located August 1, 1899, the abstract of title recites; and the records of your office disclose that the public survey embracing the section concerned was executed October 27–28, 1899, and approved March 6, 1901. It is averred on behalf of the State that in the field notes of survey of the township which includes the land in controversy, the lands therein were returned as agricultural.

For the reasons given in the case of *South Dakota v. Delicate*, this day decided by the Department (34 L. D., 717), the tract in controversy is excepted from the grant to the State if known to be mineral in character prior to the approval of the public survey identifying the section with which the conflict appears.

In the case of *Mahoganey No. 2 Lode Claim* (33 L. D., 37) the Department held (syllabus) that—

A mineral location, made prior to the admission of the State of Utah into the Union, was not of itself sufficient to establish the mineral character of the land located so as to defeat the grant to the State for school purposes made by section 6 of the act of July 16, 1894; but where the State was specially notified of the pendency of an application for patent under such location, and made no objection by way of protest or otherwise to the allowance of the mineral entry, it is bound by the record made upon such application, and a hearing for the purpose of determining the character of the land is unnecessary.

In the present case, however, the State of South Dakota responded to the notice specially served on it by denying that the tract in controversy was known to be mineral in character “at the date of field survey or approval of survey.” Upon extension of the public surveys and approval thereof, in the absence of anything in the official records to the contrary, each section 16 and 36 thereby ascertained presumptively passes to the State under its grant. Where, therefore, the mineral character of a conflicting mining claim is challenged as in this case, the usual formal proofs under mineral patent proceedings will not suffice. In such case the mineral character of the claim involved must be established by substantive proof, and the State is not bound to take the initiative at a hearing ordered for that purpose. The mineral entry allowed here without previous notice to the State can not have the effect to cast the burden upon the State; and the date of

approval of the survey whereby the school section has been identified and defined is the date as of which the mineral character of the claim must be established.

The decision of your office is modified accordingly, and the record is returned for further proceedings agreeably hereto.

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It is within the power and is the duty of the land department to require a corporation, seeking to acquire title to a desert land entry as assignee of the original entryman, to show that the individual members composing the corporation are not disqualified under the desert land law to hold and acquire title to such entry-----	443	One who fails to assert any claim to a tract of public land in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy, and improve the land, is estopped thereby from subsequently asserting a prior settlement right thereto in himself, notwithstanding the tract is found upon survey to be a part of the technical quarter-section upon which his improvements are located-----	695
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The heirs of a deceased homestead entryman may delegate to another the power to perform for their benefit the cultivation on the entry required by law, and such cultivation, if actually carried on in good faith for the required period, constitutes compliance with the homestead law the same as though performed by the heirs themselves 46

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the provisions of the act of April 28, 1904, 33 Stat., 527, upon a showing that he relinquished his original entry for the reason that the land embraced therein was unsuitable for farming purposes and was not of sufficient acreage to enable him to support himself and family by using the land for grazing purposes-----	60	homestead entry accorded by section 2 of the act of April 28, 1904, generally known as the "Kinkaid Act," is limited to persons who made their original entries prior to the date of said act-----	134
Circular of April 10, 1906, under act of April 28, 1904 (33 Stat., 547), commonly known as the "Kinkaid Act"-----	546	The right of additional entry provided for by section 2 of the act of April 28, 1904, is limited to persons who theretofore had entered under the homestead laws lands within the territory described in the act, and who own and occupy such lands, and can only be exercised upon lands contiguous to the original entry-----	60
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The act of April 28, 1904, known as the "Kinkaid Act," does not repeal any of the provisions of the homestead laws, but merely amends said laws by allowing entry of a greater number of acres, within the limits designated, than is permitted thereunder, and one disqualified to make entry under the general homestead laws, by reason of being the owner of more than one hundred and sixty acres of land, is therefore likewise disqualified to make entry under said act-----	502	An additional entry under the act of April 28, 1904, even though for a less amount of land than authorized by the act, exhausts the right; but where at the time the entryman sought to exercise his additional right, part of the lands contiguous to his original entry and subject to his preference right and desired to be entered by him, were found to be embraced within an existing though invalid additional entry made by another under said act, and he thereupon made entry for a less amount of land than he was entitled to enter, and thereafter by means of a contest procured the cancellation of the invalid entry covering the remainder of the lands desired by him,	
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Any portion of the superficial

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The owners of unpatented mining claims located upon the mineral lands of the United States are entitled to the exclusive and peaceable possession of their claims so long as they continue to comply with the requirements of the law respecting possessory rights, and are not required to apply for patent at any time, or ever, in order to preserve such possessory rights	276	An application for patent embracing a lode within the limits of a placer claim for which patent application is pending can not be permitted to proceed beyond the point of filing in the absence of a determination by the land department that the lode was known to exist at the date of the filing of the placer application; and the law does not contemplate a proceeding to that end before the land department, or the acceptance by the latter of such lode application, when an adverse suit against the placer applicant has been begun by the lode claimant, during the pendency of which all proceedings in that department must be stayed	72
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Whenever proceedings under an application for mineral patent have failed, by reason of a default incurable as to them, the application stands rejected, but may, if not in itself or for any extrinsic reason fatally defective, be made the instrument of renewed proceedings. It is not, however, in the interval a pend-		The mining laws do not require that the notice of an application for patent to a mining claim by a corporation shall designate the State or Territory under the laws of which the corporation was organized.....	568
		A recital of exclusion of conflict in the notice of an application for patent to a mining claim as effectually eliminates the conflict area as if the exception and exclusion were in terms declared in the application for patent itself	554
		By the newspaper published nearest a mining claim, within the contemplation of section 2325, Revised Statutes, is meant the newspaper of established character and general circulation in the vicinity of the claim which is nearest in point of practicable accessibility; that is, nearest by the distance from the claim involved over the most nearly direct traversable route, and over which the editions of the paper are or may be transported by the usual	

and available means of conveyance. The distance in contemplation is that which must actually be traveled to bring the paper into the neighborhood of the claim, in order that the intended office of the notice may in that vicinity be performed..... 281

Section 2325 of the Revised Statutes requires that an applicant for patent under the mining laws shall file with his application an official plat of the claim or claims applied for, and shall post a copy of such plat, together with a notice of the application for patent; in a conspicuous place on the land embraced in the plat, previous to the filing of the application, "and shall file an affidavit of at least two persons that such notice has been duly posted." The words "such notice" have been uniformly construed by the land department to embrace both the plat and notice referred to. *Held*: That the requirement as to the affidavit is mandatory, and where such affidavit is not filed all proceedings upon the application for patent are without authority of law..... 583

The provisions of the act of April 28, 1904, amending section 2327 of the Revised Statutes, relate exclusively to the question of, and are intended to prescribe the rule or guide whereby to determine, the subject-matter of mineral patents—that is, the particular tract actually conveyed by any such patent whenever the question may arise,—and in no wise modify or affect any requirement of the mining statutes with respect to notice of an application for patent, nor can they have any effect to cure defects or irregularities in the notice of patent proceedings had in any case..... 682

ADVERSE CLAIM.

An adverse claim under section 2326 of the Revised Statutes is required to be filed "during the period of publication" of notice of the application for patent, and where the last day of such period falls on Sunday, an adverse claim filed on the following Monday can not be recognized by the land department as an adverse claim within the meaning of said section and can not have the effect to stay the patent proceedings upon the application..... 568

The only judicial proceedings in which a claim may become involved, resulting in delay which would otherwise be fatal to entry, and which will protect the rights of

the applicant for patent during their pendency, are those arising under the mining laws themselves, whereby the applicant is prevented from completing his patent proceedings prior to final determination of the litigation..... 56

The general principle of the exclusive judicial cognizance of controversies involving the right of possession as between rival mineral claimants and the binding force of a court's award in such a case has in view a possessory right which is the essential basis of, and which may ultimately ripen into, the legal title obtainable from the government under the mining laws; but it necessarily remains for the land department, in the exercise of its jurisdiction and in the discharge of its duty, to determine in any such case the force and effect as against the United States of the possessory right so awarded by the court..... 401

Where a placer adverse claimant, on the strength of his placer location, prevails in a suit under section 2326, Revised Statutes, against an applicant for patent to lode claims within the placer limits, and the placer location should thereafter be found by the land department, in the exercise of its jurisdiction, to embrace non-placer land, the possessory right so awarded would fail as a basis of title to the portion of the placer location in controversy and equally to the lodes therein embraced, and would fall short of that effective basic right essential to the foreclosure of any purely lode rights in the patent applicant; and the latter would have suffered no prejudice by reason of the judgment of the court.... 401

Having prevailed in the adverse suit solely by virtue of his placer location, any additional rights which the successful adverse claimant might set up under subsequent lode locations by him of the ground in controversy would be wholly independent of the court's award..... 401

The oath to an adverse claim, made by the agent or attorney-in-fact of the adverse claimant, under the act of April 26, 1882, must be verified before an authorized officer within the land district where the adverse claim is situated, in accordance with the provisions of section 2335, R. S..... 314

Where the oath to an adverse claim is made by the agent of the adverse claimant outside of the land district, although before a notary

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public whose jurisdiction extends throughout a county lying partly within and partly without the land district, such adverse claim is not properly verified within the meaning of said section 2335-----	314	may not be extended in zigzag form so as to make the distance between the side lines of the claim exceed the width of six hundred feet allowed by law in the location of vein or lode claims-----	470
DISCOVERY AND EXPENDITURE.		PLACER.	
The cost of construction or such portions of wagon roads, used in the transportation of supplies to and ore from a mining claim or claims, as extend beyond the boundaries of the latter can not be accepted in satisfaction of the statutory requirement with respect to the expenditure in labor or improvements for patent purposes, the connection between the outlying portions of the roads and active mining operations or development being too remote to justify their acceptance-----	556	The rule of approximation permitted in entries under the homestead and other public-land laws providing for the disposal of nonmineral lands has no application to locations and entries under the mining laws.--	9
Improvements made upon one or more of several contiguous mining claims held in common may be accepted as applicable to the entire group, in satisfaction of the statutory requirement relative to the expenditure of five hundred dollars upon or for the benefit of each of the claims, only where the purpose of such improvements is to facilitate the extraction of mineral from the claims, and the improvements are of such character as to redound to the benefit of all the claims in this respect; and the fact that the mineral formation covered by the claims is a continuous deposit constituting one ore mass, will not justify applying the cost of improvements on one of the claims toward meeting the requirements of the statute as to the others, unless it appear that such improvements will aid in the extraction of mineral from, or tend to promote the development of, such other claims-----	655	The smallest legal subdivision of the public surveys provided for by the mining laws is a subdivision of ten acres, in square form; and such laws do not contemplate that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions-----	260
		The mining laws contemplate that in all cases, except in instances where impracticable so to do, placer mining locations must be made in conformity with the system of public-land surveys, that is, rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines-----	56
		The fact that a placer-mining location, if made to conform as nearly as practicable to the system of public-land surveys and the rectangular subdivisions of such surveys, as required by section 2331 of the Revised Statutes, would embrace small portions of land not valuable for placer mining, constitutes no reason for failure to conform the location to such system and legal subdivisions, where, if so conformed, the land embraced in the location would be as a whole more valuable for placer mining than for agricultural purposes-----	42
ENTRY.		It is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits-----	42
Lands not embraced in the application for patent for a mining claim, and in the published and posted notice and other proceedings, can not be embraced in the entry-----	260	A location under the mining laws does not of itself amount to an appropriation of land in such a sense as to preclude the inclusion of the same, or parts thereof, within the limits of a subsequent location, subject to such existing rights as may be thereafter maintained under the prior location; and the fact that a placer location, if made to conform to legal subdivisions of the public surveys, would embrace all or a portion of the land covered by a prior location, is not a	
LODE.			
The mining laws contemplate that the end lines of a lode claim shall have substantial existence in fact, and, in length shall reasonably comport with the width of the claim as located-----	470		
In case of a mining location upon a blanket lode or vein, the lode line			

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sufficient reason for failure to con-
form the placer location to legal sub-
divisions, as required by section 2331
of the Revised Statutes----- 44
The fact that portions of other
claims already entered may be em-
braced in a placer location by con-
forming the same to legal subdivi-
sions, does not make such conformity
impracticable, within the meaning
of section 2331 of the Revised Stat-
utes, inasmuch as under the law
such entered claims may be excluded
from patent proceedings involving
the placer ----- 44

MILL SITE.

Section 2337 of the Revised Stat-
utes contemplates that at the time
application is made for patent to a
mill-site claim the land embraced
therein is being used or occupied for
mining or milling purposes----- 325

Section 2337 does not contemplate
that patent may be obtained for a
separate mill site for each of a group
of contiguous lode claims held and
worked under a common ownership,
and where more than one mill site
is applied for in connection with a
group of lode claims a sufficient and
satisfactory reason therefor must be
shown ----- 325

The provision of section 2337 of
the Revised Statutes that: "Where
non-mineral land not contiguous to
the vein or lode is used or occupied
by the proprietor of such vein or
lode for mining or milling purposes,
such non-adjacent surface ground
may be embraced and included in an
application for a patent for such vein
or lode, and the same may be pat-
ented therewith, subject to the same
preliminary requirements as to sur-
vey and notice as are applicable to
veins or lodes," construed. *Held:*
The words "vein or lode," in said
section, are not used in the re-
stricted sense of indicating a body
of mineral, or mineral-bearing rock,
in place, only, but are used in the
larger sense of designating a lo-
cated vein or lode *claim*, and that
only non-mineral land not contiguous
to a vein or lode *claim* may be ap-
propriated for mill-site purposes----- 320

Direction given that all applica-
tions for mill-site patents which may
be made and carried to entry before
July 1, 1906, or which may, by pro-
test or otherwise, without the fault
of the applicant, be prevented from
being carried to entry before that
date, where the locations of the
claims were made and perfected

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under the law in all other respects
prior to January 1, 1904, shall be
adjudicated, in respect to the matter
of contiguity of the mill-site claims
to vein or lode claims, under the
practice which prevailed in the Gen-
eral Land Office prior to the depart-
mental ruling in the case of Alaska
Copper Company ----- 320

Notice.

See *Isolated Tract; Mining Claim;*
Practice; Settlement.

Officers.

Applicants for public lands lose
no rights by mistakes and laches of
officers of the land department; but
persons claiming the benefit of this
rule must show that they have an in-
choate right and that they have not
been so dilatory in assertion of it as
to give rival *bona fide* applicants a
superior right ----- 380

Oklahoma Lands.

Sections sixteen, thirty-six, thir-
teen and thirty-three of the lands
ceded by the Comanche, Kiowa and
Apache Indians under agreement rati-
fied by the act of June 6, 1900, re-
served for school and other* pur-
poses, are not subject to the opera-
tion of the mining laws----- 54

Under the provision of the act of
June 6, 1900, relating to the opening
to settlement and entry of the ceded
Kiowa, Comanche and Apache lands,
authorizing qualified entrymen hav-
ing lands adjoining the lands ceded,
whose entries embrace less than 160
acres, to enter so much of the ceded
lands lying contiguous as shall, with
the lands already entered, make in
the aggregate 160 acres, such entry-
men may make extension of their
existing entries so as to include por-
tions of sections thirteen and thirty-
three within the ceded country, not-
withstanding the provision of said
act reserving said sections for uni-
versity, agricultural colleges, normal
schools and public buildings of the
Territory and future State of Okla-
homa, and for all lands so lost the
Territory must look to the indemnity
provisions of its grant ----- 163

Patent.

Suit for the cancellation of a
patent will not be advised by the
land department merely because such
patent was inadvertently issued; but
it must appear that some interest of

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the government, or of some party to whom it is under obligation, has suffered by such inadvertent action.....	298	should not be granted for the purpose of permitting the contestant to supply the proof he neglected to produce at the hearing, but the contest should be dismissed.....	203
Where patent has inadvertently issued for a tract of land, the land department, notwithstanding the title has passed out of the government, has authority to order a hearing between claimants under the patent and persons asserting adverse rights to the land, with a view to determining the advisability or necessity for bringing suit for cancellation of the patent.....	298	Objection to the jurisdiction of the local office, on the ground that the record does not afford due proof of service of notice of contest, is not well founded where the fact of legal service is not denied.....	534
The provisions of the act of April 28, 1904, amending section 2327 of the Revised Statutes, relate exclusively to the question of, and are intended to prescribe the rule or guide whereby to determine, the subject-matter of mineral patents—that is, the particular tract actually conveyed by any such patent whenever the question may arise.....	682	Where the affidavit filed as a basis for an order of publication of notice of contest against an entry does not specifically allege that the entryman is a nonresident of the State or Territory in which the land is located, it should show the date or dates upon which inquiries as to the entryman's whereabouts were made, that they were made with a view to obtaining personal service of the notice, and that at that time the contestant was prepared to make personal service of the notice if the entryman were found within the State or Territory wherein the land is situated.....	473
Practice.		After a case involving conflicting claims to a tract of public land has been closed in the land department, the Secretary of the Interior, in the exercise of his supervisory power, will, upon reopening the case for further consideration, be governed by the same rule, in determining the rights of the parties, as is observed by the courts in a proceeding to charge the holder of a patent from the United States as trustee; that is, it must not only be shown that the party to whom the land has been awarded is not entitled to it, but that the party attacking his claim has the better right thereto, and that if the law had been properly administered, the land would have been awarded to him.....	82
See <i>Rules Cited and Construed</i> , page XXIX.		Preference Right.	
The Rules of Practice require that notice of an appeal to the Department shall be served upon the appellee or his counsel; but where decision in a case is inadvertently rendered by the Department in the absence of proof of service of the appeal, such decision will not be disturbed on motion for review, in the absence of a showing of reversible error, merely because of want of proper service of the appeal.....	371	See <i>Contestant</i> .	
In case a contest is erroneously dismissed upon motion of the entryman, the General Land Office is without authority to reverse such action and then dispose of the case on the evidence theretofore submitted by contestant, without first affording the entryman an opportunity to present his defense.....	396	Private Claim.	
Where the testimony in a case is authorized to be taken elsewhere than at the local office, neither party should be permitted to submit further testimony on the day set for the hearing at the local office, except upon due notice to the other and proper order therefor.....	396	Under the provisions of section 7 of the act of July 23, 1866, persons who in good faith and for a valuable consideration purchased lands from those who claimed and were thought to be Mexican grantees or assigns, are entitled, provided they fulfil the other conditions of the act, to purchase such of said lands found not to be included in the grant as finally surveyed, regardless of what other lands, not within the lines of	

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their original purchase, were finally found to be the lands granted...	67
Where the tie line purporting to connect the survey of a private land claim with the public-land surveys is shown to be erroneous, the actual locus of the claim as defined and surveyed on the ground must prevail...	67
The "necessary expenses" of making survey and plat of private land grants under the provisions of section 10 of the act of March 3, 1891, one half of which are to be paid by the grant-claimant, embrace all the expenses necessary to the completion of such a survey as will be entitled to approval by the Court of Private Land Claims, including the cost of publication of notice of the survey required by the statute and the cost of additional surveys, where necessary and ordered by the court, but not including the cost of examinations in the field made by special agents of the land department.....	136
There is no provision in the act of March 3, 1891, requiring one claiming a complete and perfect title through the Spanish or Mexican government to lands situated within the territory embraced in the Gadsden Purchase, who does not come into court voluntarily for the purpose of having his title confirmed under section 8 of said act, but is brought into court by the United States without his consent, to except from his claim, and, as a condition to the confirmation of his title, to recognize the title of the United States to, such portions of the lands claimed by him as may have been sold or disposed of by the United States.....	506
The United States may, under the provisions of said act, bring the grant claimant into court without his consent, for the purpose of determining whether he has any title to the lands claimed, and, if so, the extent of such title, but not for the purpose of confirming the title to portions of said lands sold or disposed of by the United States.....	506
The Commissioner of the General Land Office is without authority or discretion to adjudge and determine whether the survey of a private land grant conforms to the decree of the court confirming the grant, but has simply to perform the ministerial duty of issuing patent for the land according to the lines of the survey as approved by the court and in accordance with the terms of the decree.....	506

Public Land.

The provisions in the act of August 30, 1890, limiting the amount of land to which title may be acquired by any one person, under the public land laws, to 320 acres, has no application to private cash entries made under the provisions of section 2354 of the Revised Statutes...	242
The Secretary of the Interior has no power to withdraw from disposal under the general land laws public lands occupied and improved by a town for the purpose of storing and conducting a water supply to the town, pending Congressional action authorizing the town authorities to make entry of the same; but action upon any application to enter such lands may be suspended by the land department until the town authorities have been afforded opportunity to secure the contemplated legislation.....	144
In the administration of the public land laws the land department has no authority to determine on their behalf alleged rights of claimants thereunder except where such claimants seek to obtain the legal or paramount title to the lands claimed; and where a claimant seeks to obtain the legal title to a tract of public land the inquiry by the land department is directed to questions affecting his right to have such legal title conveyed to him and not to questions relating to possessory or other rights unrelated to and disconnected with his application for the legal title.....	276

Railroad Grant.

See *Railroad Lands; Right of Way.*

GENERALLY.

No rights were acquired by settlement upon lands within the ceded portion of the Red Lake Indian reservation prior to their opening to settlement and entry, and where such settlement was entirely upon lands selected with the approval of the Secretary of the Interior prior to the opening, by the Minnesota and Manitoba Railroad Company, under its grant made by the act of April 17, 1900, of right of way and necessary lands for terminal facilities at the crossing of Rainy River, no entry can now be allowed of such lands....

INDEMNITY.

The Northern Pacific Railway Company is entitled to indemnity for

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lands lost to the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company, on account of the prior grant of May 5, 1864, to the Lake Superior and Mississippi Railroad Company, between Thomson's Junction and Duluth.....	105	made until after, January 1, 1898, does not present a claim for adjustment under the provisions of the act of July 1, 1898.....	105
A railroad indemnity selection, valid when made, under departmental order relieving the Northern Pacific Railroad Company from the designation of a particular loss as a basis for the selection, will not be avoided upon an allegation that a loss subsequently designated, in obedience to departmental order of August 4, 1885, was not the nearest available loss. Any requirement for the specification of a loss as a basis for an indemnity selection is only for departmental information and as an aid in the adjustment of the grant....	105	Where an applicant to purchase under the provisions of the act of June 3, 1878, is allowed to make proof and payment in violation of an order withdrawing the land from entry, no claim is thereby initiated falling within the remedial provisions of the act of July 1, 1898.....	105
All action looking to the disposition of lands involved in second indemnity selections made by the Northern Pacific Railway Company in lieu of lands alleged to have been lost to its grant within the limits of the withdrawal on general route of the Lake Superior and Mississippi Railroad Company, has been suspended by the land department to await final determination of the question (now pending before the Supreme Court of the United States) whether lands so situated furnish a sufficient basis for second indemnity selection; but where it appears that any such lands are embraced in entries allowed prior to selection by the company, the suspension as to such lands will no longer continue. Action on such entries will proceed in due course and the selection to that extent will be canceled.....	207	Lands classified as mineral under the provisions of the act of February 26, 1895, are not subject to selection by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898.....	661
ADJUSTMENT.		Where at the time of the passage of the act of July 1, 1898, the conflicting claims of a homestead settler and the Northern Pacific Railway Company to a tract of land were of a character subject to adjustment under that act, the fact that the settler subsequently purchased the land from the company in order to protect his improvements will not prevent him from transferring his claim to other lands in accordance with the provisions of said act	209
The Northern Pacific Railway Company is the lawful successor in interest to the land-grant rights of the Northern Pacific Railroad Company	105	Where a tract of land falling within the Northern Pacific land grant and not excepted therefrom was sold by the company prior to January 1, 1898, and the purchaser thereafter, because of the erroneous decision of the land department holding said land to have been excepted from the railroad grant, sought to supplement his title by purchase of the lands from the United States under the provisions of section 5 of the act of March 3, 1887, these facts alone do not present such conflicting claims to the land on January 1, 1898, between the purchaser and the company, as are subject to adjustment under the act of July 1, 1898.....	575
Directions given that in case a selection by the Northern Pacific Railway Company is canceled for conflict, and thereafter, in the adjustment of the conflicting claims under the provisions of the act of July 1, 1898, the individual claim is canceled upon relinquishment, the selection of the company be immediately reinstated	364	Where a tract of land was inadvertently patented to the Northern Pacific Railway Company, either prior or subsequently to the act of July 1, 1898, during the pendency of an application to make homestead entry thereof based upon settlement made in good faith prior to January 1, 1898, the conflicting claims of the company and the settler are subject to adjustment under the provisions of said act, notwithstanding the issuance of such patent.....	146
An application to purchase under the provisions of the act of June 3, 1878, presented prior to, but upon which proof and payment were not		The provisions of the act of July 1, 1898, are applicable to patented lands, whether patented before or	

after the passage of the act, if such lands are in dispute between the company and the individual claimant and belong to either of the classes described therein, and where patents issued to individual claimants prior to the passage of the act, under rulings then in force, which under rulings now governing would have to be held to have been improperly issued, the conflicting claims to such lands are subject to adjustment under the provisions of said act, provided the company has not, by the selection of other lands in lieu of those in controversy, or otherwise, abandoned its claim there- 484

Under the provisions of the act of July 1, 1898, the Northern Pacific Railway Company is bound to accept the list of lands subject to relinquishment under said act prepared and submitted to it by the Secretary of the Interior, and can not, as a matter of right, require of the individual claimant the establishment of his claim at a hearing; but where a settlement claim has, upon an *ex parte* showing by the settler, been included in such a list, the Department, notwithstanding the approval of the list, has the right to inquire, by hearing or otherwise, whether the showing on which the tract was listed represented the true condition or status of the tract involved on January 1, 1898----- 153

All action looking to the disposition of lands involved in second indemnity selections made by the Northern Pacific Railway Company in lieu of lands alleged to have been lost to its grant within the limits of the withdrawal on general route of the Lake Superior and Mississippi Railroad Company, has been suspended by the land department to await final determination of the question (now pending before the Supreme Court of the United States) whether lands so situated furnish a sufficient basis for second indemnity selection; but where it appears that any such lands are embraced in entries allowed prior to selection by the company, the suspension as to such lands will no longer continue. Action on such entries will proceed in due course and the selection to that extent will be canceled. In case of a decision favorable to the company on the question pending before the court, it may then relinquish whatever claim it may have to the lands under its selection, with

a view to selection of other lands in lieu thereof under the provisions of the act of July 1, 1898----- 207

Railroad Lands.

See *Railroad Grant*.

Circular of May 22, 1906; under act of April 17, 1906, relative to settlers upon St. Paul, Minneapolis and Manitoba railway lands----- 630

The fact that a tract of land was, prior to survey, classified as mineral under the act of February 26, 1895, can not be considered as a classification of the lands as mineral "at the time of actual government survey," within the meaning of the act of August 5, 1892----- 211

Even if it be admitted, as contended by the Northern Pacific Railway Company, that the Northern Pacific land grant can never be fully satisfied from selections made within the limits provided for in the act of July 2, 1864, and the joint resolution of May 31, 1870, such fact furnishes no authority for permitting the company to relinquish the lands within the Mount Ranier National Park and the Pacific forest reserve falling within the secondary or indemnity limits of its grant, and to select other lands in lieu thereof, under the provisions of the act of March 2, 1899----- 148

The act of April 19, 1904, providing that settlers or entrymen upon lands within the indemnity limits of the grant in aid of the Chicago, St. Paul, Minneapolis and Omaha railway, and also within the primary limits of the grant in aid of the Wisconsin Central railroad, restored to the public domain November 2, 1891, by order of the land department, who were prevented from obtaining title under the public land laws because under the decision of the Supreme Court in the case of Wisconsin Central Railroad Company *v.* Forsythe the lands were held not to be excepted from the grant to the Wisconsin Central company, has no application to lands opposite the unconstructed portion of the Wisconsin Central road, which fall within the forfeiture provisions of the act of September 29, 1890----- 388

The act of February 24, 1905, relating to lands within the Mobile and Girard railroad grant, according to a homestead entryman coming within its provisions the privilege to transfer his claim to other lands, does not contemplate that an entry-

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man who has completed his entry under the commutation provisions of the homestead law and received final certificate thereon shall, in the exercise of the privilege accorded by said act, make a second homestead entry and submit proof thereon, after due notice, as required in making an original homestead entry, nor that the lands applied for shall be a compact body of contiguous land, but where not contiguous all the land must be within the same land district, and where the aggregate of the legal subdivisions applied for exceeds the acreage embraced in the original entry, the entryman will be required to pay for such excess.....	517	ever been made by him, entry on such proof can not be allowed, but as the purchase money paid by him upon submission of the proof still remains in the control and custody of the land department, repayment thereof may be made	705
An application to exercise the privilege of transfer accorded by the act of February 24, 1905, is not required to be made by the entryman in person; nor is he required to furnish an affidavit under the act of August 30, 1890, to the effect that he has not since that date made entry of or acquired title to a quantity of land under the agricultural land laws, which, with the land now applied for, will exceed three hundred and twenty acres.....	517	Repayment is not authorized under the provisions of the act of June 16, 1880, where entry is properly allowed on the proof presented, but is subsequently canceled upon a showing that such proof is false; and in this respect an assignee has no better right than the entryman.....	618
Reclamation.		An applicant for repayment of the purchase money paid on a commuted homestead entry, who claims the right to repayment as mortgagee under a mortgage executed prior to completion of the entry, is not an assignee within the meaning of the statute and is therefore not entitled to repayment	618
See <i>Arid Lands</i> .		While paragraph 13 of the instructions governing repayments, approved January 22, 1901, provides that "where there has been a conveyance of the land and the <i>original purchaser</i> applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee," any successor of such original purchaser in a line of conveyances is equally within the reason of the rule and should be given the same standing as his grantor.....	328
Repayment.		A pre-emption entryman who paid double minimum price for lands supposed to be within the limits of a railroad grant, but which were subsequently held not to be within such limits, is entitled to repayment of the excess of one dollar and twenty-five cents per acre paid by him; but where payment was made partly in cash and partly by land warrant, the Secretary of the Interior has no authority, in making repayment, to draw his warrant for an amount greater than the cash payment made by the entryman; and in such case, where the amount of the cash payment is not sufficient to make the repayment due the entryman in full, he may be permitted to make an additional cash payment of such an amount as added to the sum originally paid by him in cash will aggregate the cost of the land at one dollar and twenty-five cents per acre, and thereupon have the land warrant returned to him unsatisfied.....	551
An applicant for repayment of money paid by reason of an overcharge for area in excess of that actually embraced in the entry, will be required to furnish non-alienation affidavit or to show fully the nature, terms and conditions of any sale and conveyance of the land.....	471		
Where entry under the act of June 3, 1878, was erroneously allowed for land chiefly valuable for its mineral deposits and upon which mining claims had been located and improvements made prior to the timber land entry, but of which the entryman had no knowledge, and it appears that he acted in good faith and did not procure the entry through misrepresentation, repayment of the purchase money paid by him may be allowed	263		
Where an applicant under the timber and stone act states in his declaratory statement that he has personally examined the land applied for, when as a matter of fact he has not done so, but in his final proof swears that no inspection of the land has			

Reservation.

See *Right of Way; School Land.*

INDIAN.

Regulations of June 8, 1906, under act of April 21, 1904, relative to selections in lieu of lands in Indian reservations ----- 666

MILITARY.

The fact that the act of April 18, 1896, provides that the lands in the abandoned portion of the Fort Assiniboine military reservation, thereby opened to entry, shall be disposed of only under the laws therein specifically named, does not prevent a withdrawal, under the provisions of the act of June 17, 1902, of any of said lands as to which no vested right has attached ----- 653

FOREST LANDS.

Generally.

Circular of August 1, 1905, relative to final proof on claims within forest reserves ----- 63

Circular of July 7, 1905, under act of February 7, 1905, relating to rights of way over lands segregated from Yosemite National Park and included in Sierra forest reserve ---- 15

Instructions of June 19, 1906, under act of March 15, 1906, relative to opening of certain lands in Yellowstone forest reserve to settlement and entry ----- 700

Directions given that all applications for rights of way or other privileges over or upon public lands in forest reserves, now pending before the General Land Office and falling wholly within the jurisdiction of the Department of Agriculture, as defined in departmental letter of June 8, 1905 (concurrent in by the Secretary of Agriculture in letter of June 13, 1905), be transmitted to the Department of Agriculture for consideration and disposition ----- 64

Where applications for rights of way or other privileges affect lands lying partly within and partly without forest reserves, and involve questions within the jurisdiction of the Department of Agriculture and also questions within the jurisdiction of the land department, separate applications will not be required, but in such cases the application will be examined, and, if found regular, approved by the land department in so far as it affects lands without the reserve, and then transmitted to the Department of Agriculture for con-

sideration and such action as may be proper relative to the lands within the reserve; but in the event it appear that the right to use lands without the reserve is subordinate to permission to use lands within the reserve, the application should first be passed upon by the Secretary of Agriculture ----- 64

Act of June 4, 1897.

Two distinct classes of exchanges are authorized by the act of June 4, 1897: first, perfected titles, where title is given and title is received, in which case nothing is required to be done by the selector but to vest the United States with good title to the land relinquished in a forest reserve and to select the land taken in lieu thereof in accordance with the law and regulations governing such exchanges; and second, unperfected claims, wherein the lands taken in exchange are taken by the selector with credit for his previous partial compliance with the law governing his entry, settlement, or claim upon the relinquished land, but with obligation under such law to do such acts as he had, prior to his relinquishment, not yet performed ----- 126

Where a selection tendered under the exchange provisions of the act of June 4, 1897, is in conflict with a prior pending application, the selector should be apprised of the conflict and given opportunity to protect his rights by proper proceedings ----- 122

Where a selection tendered under the exchange provisions of the act of June 4, 1897, is in conflict, in part, with prior pending applications, it should not, for that reason, be rejected in its entirety, but the selector should be afforded opportunity to protect his rights by proper proceedings ----- 301

The fact that land is more valuable for the timber and stone thereon than for agricultural purposes does not bar selection thereof under the provisions of the act of June 4, 1897, if not mineral in character ----- 115

Pending disposition of a school-land indemnity selection, even though erroneously received, selection of the same land in lieu of a tract in a forest reserve relinquished under the exchange provisions of the act of June 4, 1897, should not be allowed. ----- 119

The fact that a successful contestant who in the exercise of his preference right applies to select the land under the act of June 4, 1897, did

not have title to the land assigned as base for the selection at the date of the initiation of the contest, furnishes no ground for rejection of the application, it being only necessary that the selector have title to the base land at the time he initiates the proceeding for an exchange under the act by relinquishing it to the United States-----

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376

Lands formerly embraced within the Fort Assiniboine military reservation, and opened to entry by the act of April 18, 1896, are subject to selection in lieu of lands within a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897-----

296

The provision in the act of July 4, 1884, that the lands in the former Columbia Indian reservation by said act restored to the public domain should be disposed of "to actual settlers under the homestead laws only," is no bar to the selection of portions of said lands in lieu of an unperfected claim to lands in a forest reserve, based upon homestead settlement, and relinquished under the exchange provisions of the act of June 4, 1897-----

127

The provision of the act of June 6, 1900, which declares that subsequently to October 1, 1900, "all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, . . . shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry," applies only to selections made under the provisions of the act of June 4, 1897, and has no application to selections made by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899-----

88

Where at the date of the act of March 3, 1905, repealing the exchange provisions of the act of June 4, 1897, no selection had been made in lieu of lands within a forest reserve relinquished to the United States in accordance with the provisions of the act of 1897, the land department is without authority to now permit such selection to be made-----

458

In case a selection under the exchange provisions of the act of June 4, 1897, is canceled for conflict with a prior settlement claim, and another selection for a like quantity of land is made in lieu thereof, under the proviso to the act of March 3, 1905,

the abstract of title of the relinquished land assigned as a basis for the selection must be extended to the date of the later application-----

564

A selection under the provisions of the act of June 4, 1897, for a less area than embraced in the relinquished land offered as a base, not the result of mischance or misprision on the part of the local officers, is a waiver of the excess; and there is nothing in the act of March 3, 1905, repealing the act of June 4, 1897, authorizing the selector to make a further selection based upon such excess area-----

578

Where prior to the repeal of the exchange provisions of the act of June 4, 1897, by the act of March 3, 1905, selection was made and approved for unsurveyed lands described in terms of legal subdivisions of the public surveys, and upon survey some of the subdivisions were shown to be fractional and to contain a less area than contemplated by the selection, the selector may, under the saving provisions of the act of March 3, 1905, make additional selection to cover such deficiency-----

603

Reservoir Lands.

See *Arid Land; Right of Way.*

Residence.

The fact that a homestead entryman holds an official position the duties of which are required to be performed at some place other than on the land embraced in his entry, constitutes no sufficient excuse for his absence from the claim, unless it be shown that his absence is actually due to his official position or employment-----

30

A homestead entryman is entitled to the exclusive possession and enjoyment of the land embraced in his entry, and where he in good faith builds a house upon the land with a view to establishing residence and complying with the law, but is prevented by the threats of a rival claimant from establishing residence upon the particular portion of the land selected by him for that purpose, it is not incumbent upon him to establish his residence upon another portion of the land, and he will not be held in default for failure to do so-----

348

Failure of a homestead entryman to reside upon his claim, necessitated by employment in the public service,

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will not be construed an abandonment thereof, where he in good faith established and maintained residence prior to engaging in such service and has continued to comply with the requirements of the law in the matters of cultivation and improvement; but such employment will not relieve from the necessity of establishing residence nor excuse the entryman's failure in that respect-----	396	of the land department, separate applications will not be required, but in such cases the application will be examined, and, if found regular, approved by the land department in so far as it affects lands without the reserve, and then transmitted to the Department of Agriculture for consideration and such action as may be proper relative to the lands within the reserve; but in the event it appear that the right to use lands without the reserve is subordinate to permission to use lands within the reserve, the application should first be passed upon by the Secretary of Agriculture -----	64
Right of Way.		No rights can be initiated for the use or benefit of any railroad company under the provisions of section 1 of the act of March 3, 1875, prior to the organization of such company under the laws of a State or Territory -----	593
Regulations relative to applications for use of name of United States in judicial proceedings to forfeit rights of way-----	358	The grant of sections sixteen and thirty-six made to the Territory of New Mexico for school purposes by the act of June 21, 1898, is a grant <i>in praesenti</i> , and any question as to the authority of the Territory to grant rights of way for railroads across any such lands is one for determination by the officers of the Territory and not by the Secretary of the Interior-----	548
Circular of July 7, 1905, under act of February 7, 1905, relating to rights of way over lands segregated from Yosemite National Park and included in Sierra forest reserve-----	15	The right of way granted by section 13 of the act of February 28, 1902, is a mere easement, for "depot grounds, terminals, and other railway purposes," and the grantee has no authority to extract oil from the grounds embraced in a right of way acquired under said act-----	504
Regulations of September 28, 1905, relative to rights of way for canals, ditches, reservoirs, telegraph and telephone lines, etc-----	212	The act of March 3, 1901, specifically provides that telephone and telegraph lines constructed under its provisions shall be operated and maintained under rules and regulations to be prescribed by the Secretary of the Interior, which carries with it the power to require sworn statements from the person, company, or corporation operating the lines, to the end that the annual tax be properly assessed and collected; but in the event of noncompliance with such requirement, it is not within the power of the Secretary, under executive authority, to close the places of business of the offending parties, any question as to the forfeiture of the right of way being a matter for determination by the courts -----	288
Paragraph 2 of circular of February 11, 1904, and paragraphs 3 and 66 of the circular of September 28, 1905, relating to rights of way for railroads, canals, reservoirs, etc., amended-----	583		
Paragraph 54 of the regulations of September 28, 1905, requiring that all applications for rights of way under the act of February 15, 1901, for telegraph and telephone lines, must be accompanied by an official statement of the Post Office Department showing that the applicant has complied with the regulations under title 65 of the Revised Statutes, revoked-----	693		
Directions given that all applications for rights of way or other privileges over or upon public lands in forest reserves, now pending before the General Land Office and falling wholly within the jurisdiction of the Department of Agriculture, as defined in departmental letter of June 8, 1905 (concurring in by the Secretary of Agriculture in letter of June 13, 1905), be transmitted to the Department of Agriculture for consideration and disposition-----	64		
Where applications for rights of way or other privileges affect lands lying partly within and partly without forest reserves, and involve questions within the jurisdiction of the Department of Agriculture and also questions within the jurisdiction			

The annual tax upon telephone and telegraph lines referred to in section 3 of the act of March 3, 1901, is conditioned upon two things: (1) The line upon which the tax is sought to be imposed must be upon lands such as the Secretary of the Interior is authorized to subject to the terms of the act, and (2) the line must not be subject to State or Territorial taxation. Where the line upon which the tax is sought to be imposed runs through any of the lands which the Secretary is authorized to subject to the terms of the act, and is not subject to State or Territorial taxation, such line is under the act subject to an annual tax not exceeding five dollars for each ten miles thereof constructed and maintained, regardless of any tax which may be levied and collected by a municipality through which the line runs. 289

Rights of way under the provisions of section 3 of the act of March 3, 1901, are "in the nature of an easement," and are property rights subject to sale or transfer without the consent of the Secretary of the Interior. 288

The term "line," as employed in section 3 of the act of March 3, 1901, means the right of way granted, and each separate line of poles is held to constitute an independent line, upon which the grantee may place as many wires as he chooses, the tax to be assessed against the property only at the rate of five dollars for each ten miles of line. In towns, where no well-defined system of parallel wires is maintained, each wire will be regarded as covering a separate right of way, and, if otherwise within the terms of the act, is subject to taxation as such. 288

The approval by the Secretary of the Interior of the plats of incorporated cities and towns in the Indian Territory operates as a dedication of the streets and alleys thereof to public use, and thereafter, the Indians no longer having any interest in the ground embraced in such streets and alleys, the Secretary of the Interior has no authority to subject them to the terms of section 3 of the act of March 3, 1901, authorizing him, among other things, to grant rights of way for the construction of telephone and telegraph lines within and through incorporated cities and towns in the Indian Territory. 679

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Riparian Rights.

Upon the admission of a State into the Union it acquires in its sovereign capacity the right to all the soil under navigable rivers, subject to the power of Congress to regulate commerce among the States and with foreign nations, and all lands that may afterward form upon the beds of such streams become the property of the sovereign State, or of the proprietor of the shore lands, in virtue of his riparian right; according to the law of the State in which the land is situated. 423

School Land.

GENERALLY.

Sections sixteen, thirty-six, thirteen and thirty-three of the lands ceded by the Comanche, Kiowa and Apache Indians under agreement ratified by the act of June 6, 1900, reserved for school and other purposes, are not subject to the operation of the mining laws. 54

The grant of sections sixteen and thirty-six made to the Territory of New Mexico for school purposes by the act of June 21, 1898, is a grant *in praesenti*, and any question as to the authority of the Territory to grant rights of way for railroads across any such lands is one for determination by the officers of the Territory and not by the Secretary of the Interior. 548

The grant of sections sixteen and thirty-six made to the State of South Dakota for school purposes by the act of February 22, 1889, took effect on the admission of the State into the Union, as to lands at that date identified by the government survey, but as to such of the indicated sections as had not been surveyed at the date of the admission of the State, the right of the State does not attach unless and until identified by survey, and if at the time of survey they are known to be mineral in character, they are excepted from the grant. 485

The grant of sections sixteen and thirty-six, to the State of South Dakota for school purposes, by the act of February 22, 1889, took effect on the admission of the State into the Union as to lands of the class and character subject to the grant in such of said sections as were at that date identified by the government

surveys. As to unsurveyed lands, the grant does not attach until identification by approved survey, and if at that time any of the lands embraced in such sections are known to be mineral in character they are excepted from the grant----- 717

INDEMNITY.

Regulations of January 10, 1906, relative to school indemnity selections ----- 365

The requirement in rule 2 of the instructions of March 6, 1903, that with each list of indemnity school selections "a certificate of the proper authorities that the base lands have not been sold, encumbered, or otherwise disposed of," shall be furnished by the State, adhered to ----- 245

Pending the disposition of a school land indemnity selection, even though erroneously received, no other application including any portion of the land embraced in such selection should be accepted, nor will any rights be considered as initiated by the tender of any such application... 12

In the adjustment of school land grants, it is within the power, and is the duty, of the land department to see that sufficient losses, or quantities of land to which the State might have been entitled under its grant had they been in place and not otherwise disposed of, equal in amount to previous certifications on account of the grant, approximately, are furnished as a base for such previous approvals or certifications, before other approvals and certifications are made on account of the grant ----- 270

There is nothing in the act of March 1, 1877, relating to indemnity school land selections in the State of California, in conflict with this requirement ----- 270

Where a school section is embraced within the limits of an Indian reservation, the State may, under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, waive its right thereto and select other land in lieu thereof, notwithstanding such section was identified by survey prior to the establishment of the reservation ----- 613

Under the grant of sections sixteen and thirty-six made to the State of South Dakota for school purposes by the act of February 22, 1889, the State takes no vested in-

terest or title to any particular land until it is identified by survey, and prior to such identification the grant, as to any particular tract, may be wholly defeated by settlement; the State's only remedy in such case being under the indemnity provisions of said act and of the act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes.... 657

Where the title to school sections has vested in the Territory of New Mexico under the grant made by the act of June 21, 1898, and such sections are subsequently embraced within a reservation created by executive order, the Territory may, under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, waive its right thereto and select other lands in lieu thereof ----- 599

The act of February 28, 1891, amending section 2275 of the Revised Statutes, protects all rights acquired by settlements made prior to survey in the field upon sections sixteen or thirty-six, reserved for school purposes, but where a township is ordered surveyed on application in behalf of the State, under the act of August 18, 1894, and the lands are withdrawn for the purposes specified therein, such settlements only as were made prior to the withdrawal are protected as against the State ----- 434

Where at the time of survey of a township a portion thereof was returned as a "salt lake now dry," and no further survey of the township has since been made, the State, after a lapse of more than forty years, is justified in accepting such survey as a final and complete survey of the township and in proceeding with the adjustment of its school land grant upon the theory that the township is fractional ----- 716

Where public lands of the United States are in good faith purchased from a State in the belief that the State has acquired title thereto under its school grant, and in faith of such purchase are held and occupied for many years, entry thereof by a third party should not be allowed without first affording the State an opportunity to make good the title purported to be conveyed by it, by assigning a proper and sufficient basis and making selection of the land under its school grant; and in case of failure on the part of the State to make the title good, the

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present claimant through purchase from the State should be afforded opportunity to protect his rights by himself making entry of the land under the public land laws.....	304	side of the technical quarter-section on which the improvements are located, will protect the settler's claim to such subdivision as against the claim of one who subsequently makes application therefor under the timber and stone act.....	90
Selection.		One who fails to assert any claim to a tract of public land in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy, and improve the land, is estopped thereby from subsequently asserting a prior settlement right thereto in himself, notwithstanding the tract is found upon survey to be a part of the technical quarter-section upon which his improvements are located.....	695
See <i>Railroad Grant; Reservation; School Land; States and Territories; Swamp Land.</i>		Special Agent.	
Settlement.		Circular of February 14, 1906, relative to manner of proceeding on special agents' reports.....	439
As between rival applicants for the same land, the prior settler must maintain his prior right by continued compliance with the law--	298	States and Territories.	
No rights can be acquired by acts of settlement as against an entryman claiming under a prior record entry, but as between subsequent claimants the prior actual settler is entitled to precedence upon the cancellation of the entry or extinguishment of the record title.....	257	See <i>School Land; Swamp Land.</i>	
The rule that settlement rights can not be acquired by the tenant or employee of another which can be set up to defeat intervening rights, is not applicable in all cases where the relation of landlord and tenant is established, and should never be extended to cases where the relation of tenant was assumed merely for the purpose of protecting settlement rights and in furtherance of a <i>bona fide</i> intention on the part of a settler to assert his rights at the first opportunity.....	257	Failure on the part of a State to publish notice of an application for the survey of lands within thirty days from the date of such application, as provided by the act of August 18, 1894, does not affect its preference right to select such lands, for the period of sixty days from the filing of the township plat of survey, conferred by the act of March 3, 1893.....	139
Settlement upon lands in advance of the hour of opening, in violation of an order of the land department prohibiting such settlement, confers no rights upon the settler as against the first legal applicant to enter the land after the hour of opening, and such settler can not, by virtue of his mere presence upon and occupancy of the land after the hour of opening, with the improvements made prior to that time, secure a settlement right.....	524	The provision in the act of March 3, 1893, according to certain States a preference right, over all persons or corporations, except prior settlers, for a period of sixty days from the filing of the township plat of survey, within which to select lands under grants made by the act of February 22, 1889, was not repealed by the provisions of the act of August 18, 1894, according a similar right of selection for a period to extend from the date of application by the State for the survey of the lands until the expiration of sixty days from the date of the filing of the township plat, provided notice of the application for survey be published within thirty days from the date of the filing of such application.....	139
Notice of a settlement claim, posted conspicuously on the land, is sufficient to protect the claim against one who subsequently makes application for a portion thereof under the timber and stone act, whether the timber-land applicant has actual notice of the settlement claim or not, provided the posted notice was of such character that it might have been seen by a reasonable exercise of diligence.....	90	The preference right, for a period of sixty days from the filing of the township plat of survey, accorded the State (Idaho) by the act of March 3, 1893, within which to make selection of lands under grants	

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to the State, does not segregate the lands against other applications, but they should be received, subject to the State's right, and, if that be not exercised, take effect, if otherwise entitled to approval, as of the date of their presentation-----	301
All leases or "permits for right of pasturage" issued by the board of public lands of the Territory of New Mexico under the provisions of acts of the legislative assembly of that Territory, and covering any of the lands granted to the Territory by the act of June 21, 1898, should be limited, in accordance with the provisions of section 10 of that act, to not exceeding one section or 640 acres of land to any person, corporation, or association of persons, and all such leases or permits must be submitted to the Secretary of the Interior for his approval-----	143

Statutes.

See *Acts of Congress and Revised Statutes cited and construed*, pages XXV and XXVIII.

Survey.

It is within the power of the land department at any time to re-trace any surveys it has made whenever it becomes necessary to the determination of a question pending before it for its decision involving rights in public lands-----

188

The provision of the act of August 18, 1894, authorizing the survey, on application in behalf of the State, of any unsurveyed townships of public lands therein, and the withdrawal thereof from the date of the application until the expiration of sixty days from the filing of the township plat, with a view to satisfy the public land grants to the State, authorizes and requires the withdrawal of all of the lands in the townships for the survey of which application is made on behalf of the State-----

438

Swamp Land.

In the adjustment of all claims for public lands in the State of Minnesota initiated in accordance with law prior to survey of the lands, in instances where selection thereof is made by the State under its swamp land grant, and the field notes of survey afford a sufficient basis for such selection, the land department will, by hearing or otherwise, determine the true character of the lands,

notwithstanding the return of the field notes of survey of the township.-----

22

In the adjustment of all claims resting on a selection or exchange of lands, presented in accordance with law for public lands in the State of Minnesota, prior to survey thereof, the land department will, by hearing or otherwise, determine the true character of the lands selected, if claim is presented thereto on behalf of the State under its swamp land grant, based upon the field notes of survey, notwithstanding the return of the field notes of survey of the township may afford a sufficient base for the State's claim-----

151

The issuance of patent upon entries embracing lands alleged by the State to have passed to it under its swamp land grant terminates the jurisdiction of the land department thereover; and any question as to the character of the lands and whether the issuance of patent therefor was inadvertent will be inquired into only for the purpose of determining whether recommendations should be made for the institution of suit to set aside the patent. The question as to whether the issuance of patent amounted to an adjudication that said lands were not swamp, and therefore did not pass to the State under its grant, is one for determination by the courts, and not by the land department-----

246

Timber and Stone Act.

"Lands chiefly valuable for stone" are subject to entry under the act of June 3, 1878, regardless of whether or not the stone can, under existing conditions, considering the cost of quarrying and transportation, be marketed at a profit-----

123

An executive order reserving lands for a specific public purpose has the same effect, as against an application to purchase under the act of June 3, 1878, as an adverse claim of a private individual-----

191

Where an applicant to purchase under the act of June 3, 1878, fails to submit proof on the day fixed therefor in the published notice, or within ten days thereafter where prevented by accident or unavoidable delay from submitting it on the day set therefor, a withdrawal theretofore made for forestry purposes, embracing the land, thereupon immediately attaches and becomes effective as to such land, regardless of the fact that the applicant, within the

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ten-day period after the date fixed in the notice, may have filed application to readvertise notice of intention to submit proof-----	191	row the purchase money is a lumberman or engaged in acquiring timbered lands, or that under pretense of a mortgage security the entry is made or intended to be for his benefit or that of any person other than the applicant herself-----	133
The affidavit or sworn statement required of an applicant to purchase under the timber and stone act must be sworn to in the county, parish or land district where the land is situated; and where in such statement the land intended to be taken is incorrectly described, and an application to amend the original statement so as to properly describe the lands desired is filed, the amendatory affidavit must be sworn to in the same manner as required in case of an original affidavit-----	539	An applicant to purchase under the timber and stone act is entitled to a copy of the final proof submitted on his application-----	133
An agreement or contract entered into by a timber and stone entryman, prior to final proof, and the issuance of certificate, for the sale of the timber on the land, is in violation of the provisions of the act of June 3, 1878, against the speculative entry of timber lands for the benefit of another-----	581	Timber Cutting.	
An applicant to purchase under the timber and stone act does not become the owner of the land applied for, with legal right to sell, mortgage, or otherwise encumber the same, until the required proof has been furnished, the purchase price tendered and received, receipt given therefor, and final certificate issued, and at any time prior thereto the land department may require the applicant to furnish an affidavit of non-alienation-----	476	The provisions of section 8 of the act of March 3, 1891, as amended by act of the same date, conferring upon the residents of certain States and Territories authority to cut timber on the public lands for agricultural, mining, manufacturing or domestic purposes, contemplate the cutting and use of timber for smelting purposes-----	78
In case of an application by a married woman to purchase under the timber and stone act, it is immaterial whether the proof that she proposes to make the purchase with her separate money and for her own use and benefit be shown by the particular specified affidavits in the regulations, or in some other manner, so long as the facts required to be shown are proved by competent evidence in some portion of the record-----	129	Cities and counties are "residents" of the State in which they are located, within the meaning of that term as used in section 8 of the act of March 3, 1891, as amended, conferring upon the residents of certain States and Territories authority to cut timber on the public lands for agricultural, mining, manufacturing, or domestic purposes-----	112
The fact that a married woman making application to purchase under the timber and stone act proposes to pay from her separate money only the fees and expenses of making the entry, and to borrow upon her own credit, to be secured by mortgage on the land, the sum necessary to pay therefor, does not of itself impugn the good faith of the applicant, in the absence of anything tending to show that the person from whom she proposes to bor-		Timber used by cities for constructing electric-light plants and building bridges, and by counties for building bridges and constructing flumes across the county roads, is used for "domestic purposes" within the meaning of section 8 of the act of March 3, 1891, as amended-----	112
		Townsite.	
		Paragraph 13 of regulations of August 1, 1904, relative to townsites in Alaska, amended-----	71
		There is no requirement that townsite proof shall be made by persons not resident of the town, and such residence does not affect their competency to make such proof-----	708
		Under the provisions of section 16 of the act of March 3, 1891, townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, subject to existing rights under any valid mining claim or possession, lode or placer, held under existing law-----	102
		Under section 11 of the act of March 3, 1891, attorney's fees may be properly included in the account of a townsite trustee, as legitimate	

expenses incident to the execution of his trust, and allowed by the land department, where necessary and not in excess of a just and reasonable amount ----- 287

The term "judge of the county court for the county," employed in section 2387 of the Revised Statutes to designate the officer authorized to make townsite entry under said section, as trustee for the several use and benefit of the occupants of the townsite, embraces any presiding judicial officer of a court having jurisdiction within the county; and where any one of several officers coming within the purview of the statute is designated by the State legislature as the proper officer to assume the trust and make the entry, such designation is entitled to be recognized by the officers of the land department... 24

Where a patent has not issued for a public reservation in a townsite at the date the townsite is vacated, and the original entryman for such reservation falls to make application therefor within six months from the vacation of the townsite, it thereupon, under the provisions of the act of May 11, 1896, becomes subject to disposal as an isolated tract under section 2455 of the Revised Statutes, and can not be disposed of in any other manner ----- 356

The reservation of a lot in a townsite in the Territory of Oklahoma for the purpose of erecting thereon an armory for use of a company of the Oklahoma National Guard, constitutes a reservation for "the public interest" within the meaning of section 4 of the act of May 14, 1890, authorizing the Secretary of the Interior to reserve any undisposed-of lots in townsites in said Territory for "public use as sites for public buildings" if in his judgment "such reservation would be for the public interest" ----- 530

In view of the provisions of the act of February 9, 1903, which extended the townsite laws to the lands within the ceded limits of the Red Lake Indian reservation and authorized their occupation for townsite purposes prior to formal opening thereof to disposition under the homestead laws, the occupation of a portion of said lands as a townsite prior to and on the date they were opened to settlement and entry, prevented the attachment of any rights on that date under a settlement with

a view to acquiring title under the homestead laws, covering the same land, initiated prior to occupation of the land for townsite purposes ----- 94

Warrant.

Where the only objection to confirmation of a military bounty land warrant location, made in good faith, is the purely technical one that through inadvertence of the land department the land covered thereby was never formally offered at public sale under the provisions of the act of July 4, 1876, as it should have been, of which fact the locator was ignorant, the location may be referred to the Board of Equitable Adjudication for confirmation under Rule 11 ----- 21

The location of a military bounty land warrant issued prior to the death of the warrantee, by one claiming through an assignment of the warrant from the widow of the warrantee, will not be confirmed in the absence of proof showing that the widow was the sole heir, or was authorized to assign the interests of the other heirs, if there were any... 37

The substitution of cash for a military bounty land warrant will not be permitted where the only obstacle to confirmation of the location under the warrant is the refusal of the locator or transferee to endeavor to procure the necessary proof to establish the validity of the location... 37

Where two military bounty land warrants are erroneously issued upon the same military service, both can not be recognized, and where in such case the warrantee, having both warrants in his possession, assigns one of them, he is estopped thereafter to assert the validity of the other, and an assignee of such invalid warrant has no higher legal right than the warrantee ----- 606

The issue of a duplicate military bounty land warrant under the provisions of the act of June 23, 1860 (now section 2441, Revised Statutes), in the belief that the original has been lost or destroyed, creates no new liability or obligation on the part of the United States, where the original warrant had been located and satisfied prior to the issue of the duplicate ----- 610

Water Right.

See *Arid. Land.*